Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

BRIAN SHEPPARD,

Petitioner,

v.

LEON BEERMAN,
as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED

1. Whether a federal court properly may dismiss a law clerk's complaint alleging that the judge for whom the clerk worked violated the Fourth Amendment in searching the clerk's office and seizing and searching the clerk's belongings therein to find and confiscate the clerk's personal notes about the judge's official misconduct, by holding that (a) law clerks as a class have no legitimate expectation of privacy against searches of their offices, desks, and filing cabinets, and (b) the seizure and search of a public employee's belongings is permissible if the public employer asserts that the seizure and search were effected to locate documents belonging to the employer.

2. Whether a public employer, consistent with the First Amendment, may discharge an employee in retaliation for the employee's private objections to the employer about the employer's serious and ongoing official misconduct by simply (a) having the employee confirm prior to the discharge that the employee would make the misconduct public if discharged or (b) denying the misconduct after the discharge and citing the confidential nature of the employee's position.

3. Whether a person is seized within the meaning of the Fourth Amendment when government officers force the person to accompany them out of a building.

4. Whether the First Amendment prohibits court officials from ejecting a person from a courthouse, and barring that person's reentry, in the absence of any legitimate governmental interest.

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Petitioner Brian Sheppard respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the Court of Appeals (App. 1a-10a, 11a-21a, and 22a-30a)[1] are reported at 18 F.3d 147, 94 F.3d 823, and 317 F.3d 351, respectively.

The opinions of the United States District Court for the Eastern District of New York (Glasser, D.J.) (App. 31a-53a, 54a-76a, and 77a-117a) are reported at 822 F. Supp. 931, 911 F. Supp. 606, and 190 F. Supp. 2d 361, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 2003. A timely petition for rehearing was denied on March 11, 2003. (App. 148a-149a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution, as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, provides in relevant part that governments "shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the United States Constitution, similarly made applicable to the States, provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

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[1]All of the appendix material for this Petition appears in one separately bound volume. Pagination in the Appendix includes the suffix "a."

STATEMENT OF THE CASE

Petitioner is an attorney who graduated from Stanford Law School in 1979. Between 1986 and 1990, he served as the sole law clerk to Respondent, then a New York State Supreme Court justice presiding over criminal cases. During that period, Petitioner was exposed to serious, ongoing, widespread misconduct on the part of Respondent, other judges, and prosecutors. When, in December of 1990, Petitioner raised strong objections to Respondent about the misconduct and acknowledged that he might publicize his notes about the misconduct, Respondent discharged him, had him forcibly ejected from the courthouse, searched his office and belongings therein, and seized his belongings.

In 1991, Petitioner filed this action for damages and equitable relief in the United States District Court of the Eastern District of New York, primarily under 42 U.S.C. § 1983. The Complaint (App. 150a-159a) alleged, *inter alia*, violations of Petitioner's First Amendment rights to free speech and access to criminal proceedings, and his Fourth Amendment right to be free from unreasonable searches and seizures. (App. 157a ¶ 38.) In 1994, the United States Court of Appeals for the Second Circuit affirmed the District Court's dismissal of all of the claims other than the free speech claim, but vacated the District Court's dismissal of that claim. In 1996, the Second Circuit vacated the District Court's second dismissal of the free speech claim. In 2003, the Second Circuit affirmed the District Court's grant of summary judgment to Respondent on that claim.

I. The 1991 Complaint

The Complaint provided examples of the misconduct that occurred in two cases that were before Respondent at the time of the parties' December 1990 argument. Respondent had had one of those cases--a vehicular homicide--assigned to him so that he could exact revenge against the defendant for having been rearrested, told Petitioner that he would do all he could to obtain a conviction, and followed through on

that promise. (App. 151a-152a ¶¶ 8-9, 12.)

In the other case--a murder prosecution--Respondent had had improper *ex parte* communications with the prosecution. On December 6, 1990, Respondent ordered Petitioner to draft a decision in that case denying the defendant's speedy trial motion without a hearing, regardless of the merits, so that the defendant would stand trial, and at a time desired by the prosecution. (App. 151a-152a ¶¶ 8, 10.)

At the outset of the following day, Petitioner refused to follow the order. Respondent then told him to look for another job. Petitioner declined, saying *he* was not the one who had acted improperly. Respondent denied any impropriety until Petitioner reminded him of his misconduct in the vehicular manslaughter case and other cases, and indicated that Petitioner had taken notes of courthouse events. (App. 152a ¶¶ 11-12.)

Respondent expressed concern as to whether and when Petitioner would make his notes public. He responded that he was not certain, but that he would no longer have a duty of loyalty to Respondent if Respondent continued to pressure him into taking part in misconduct. (App. 152a ¶ 13.)

During the argument, voices were raised, and Respondent called Petitioner "disturbed" and "disloyal," while Petitioner said that Respondent was "corrupt" and a "son-of-a-bitch." Petitioner immediately apologized for the expletive, after which Respondent said nothing about it. But Respondent's adamant protestations, that his intermittent wrongdoing did not render him "corrupt," failed to persuade Petitioner. (App. 152a-153a ¶¶ 14-15.)

The argument ended with no resolution. Petitioner worked the remainder of the day without incident. After the intervening weekend and his illness on December 10, he returned to work on the 11th. In that intervening period, Respondent fruitlessly searched Petitioner's office for the notes, but did find something that caused Respondent to fear that Petitioner intended to report on judicial misconduct on December 12. (App. 153a-154a ¶¶ 16, 18-19.)

On December 11, after Petitioner had been working in chambers for two hours and Respondent had not yet shown

up, armed, uniformed court officers entered chambers, advised Petitioner that he had been discharged, and escorted him out of the *courthouse*, telling him that he had to leave the courthouse with them right then, without his belongings. Respondent then searched Petitioner's office again, including the desk drawers and filing cabinets, and removed Petitioner's personal file cards into Respondent's office and examined them. (App. 154a-155a ¶¶ 20-25.)

When Petitioner returned to his office on December 13 in the company of court officers so that he could recover his belongings, he was prevented from taking his personal files with him. After Respondent examined those files, they were given to Petitioner on December 17. (App. 155a ¶¶ 26-27.)

The various seizures and searches were supported by neither the policies nor customs of Respondent or other New York judges. (App. 155a ¶ 29.)

II. The 1993 Dismissal and *Sheppard I*

Respondent's first motion for judgment on the pleadings, *see* Fed. R. Civ. P. 12(c), was argued and deemed submitted in April of 1992. After Petitioner in April of 1993 effectively obtained a writ of mandamus from the Second Circuit forcing the District Court to decide the motion within 30 days, the District Court granted the motion and dismissed the case. 822 F. Supp. 931. (App. 31a-53a.) The Second Circuit vacated the dismissal of the free speech claim, and otherwise affirmed. *Sheppard v. Beerman*, 18 F.3d 147 (2d Cir. 1994) [hereinafter *Sheppard I*] (App. 1a-10a).

Sheppard I (App. 7a-8a) dismissed the Fourth Amendment claim as to the searches of Petitioner's office, desk, and filing cabinets, expressly adopting the ground *sua sponte* raised by the District Court (App. 44a-45a) that, unlike all other government employees, law clerks as a class have no reasonable expectation of privacy in such places. While the Complaint alleged that Respondent seized and searched Petitioner's belongings, including his personal file cards and files, for the purpose of confiscating his notes on Respondent's misconduct (App. 153a-155a ¶¶ 18(a), 24-27), *Sheppard*

I (App. 8a-9a) dismissed the Fourth Amendment claim as to those seizures and searches on the ground that a short delay in searching the belongings of a discharged employee is reasonable to prevent the employee from destroying or confiscating government property.

Although Petitioner argued to both courts below that he was seized in violation of the Fourth Amendment when he accompanied armed court officers from Respondent's chambers to outside the courthouse pursuant to their order to him (*e.g.*, Pet. C.A. *Sheppard I* Br. 30-34), *Sheppard I* (App. 9a) explicitly agreed with the District Court's *sua sponte* holding (App. 45a n.3) that Petitioner was not seized because he was free to go anywhere outside the courthouse after he was forced to leave the building. While Petitioner argued to both courts that his First Amendment right to be in the courthouse was violated by his forcible removal therefrom for no legitimate governmental purpose (*e.g.*, Pet. C.A. *Sheppard I* Br. 35-38), both courts dismissed this claim without addressing it (App. 6a-7a, 9a, 42a-43a).

Finally, *Sheppard I* (App. 5a-6a) vacated the District Court's dismissal of the free speech claim (App. 34a-42a) for ignoring the allegations in the Complaint (*e.g.*, App. 150a, 153a-154a ¶¶ 1, 18, 21) as to Respondent's motivation in discharging Petitioner.[2]

III. The 1995 Dismissal and *Sheppard II*

Before the taking of depositions began, Respondent again moved for judgment on the pleadings as to the free speech claim, renewing his earlier arguments. In 1995, the District Court granted the motion and dismissed the case again. 911 F. Supp. 606. (App. 54a-76a.) In dismissing the request for damages, the court *sua sponte* held that the issue of an

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[2]This Court denied Petitioner's application for certiorari from some of the rulings in *Sheppard I* adverse to him. *Sheppard v. Beerman*, 513 U.S. 816 (1994). Of course, that earlier denial does not preclude or affect the instant application. *United States v. Carver*, 260 U.S. 482, 490 (1923); Robert Stern et al., *Supreme Court Practice* § 4.18, at 260-61 (8th ed. 2002).

employer's intent in a free speech retaliation case is *irrelevant* in the context of qualified immunity. (App. 67a-71a.)[3] The court also *sua sponte* dismissed the request for declaratory and injunctive relief. (App. 71a-75a.) In *Sheppard v. Beerman*, 94 F.2d 823 (2d Cir. 1996) [hereinafter *Sheppard II*], the Second Circuit vacated every aspect of this second dismissal as being contrary to the law and the facts alleged in the Complaint. (App. 11a-21a.)

IV. The 2002 Grant of Summary Judgment and *Sheppard III*

In 2000, after substantial discovery, Respondent moved for summary judgment on the remaining, free speech claim. The evidence Petitioner provided in opposition to the motion closely conformed to the allegations in the Complaint--largely on the basis of Petitioner's own deposition testimony--but with the following particularly noteworthy additions.

Petitioner's testimony expanded on the types and scope of the misconduct he observed during his tenure with Respondent. This included improper *ex parte* communications involving Respondent and other judges, on the one hand, and prosecutors--including some at the highest levels--on the other hand, and Respondent's physically altering his jury standard jury charge forms for the expressed purpose of increasing the likelihood of conviction against certain defendants. (C.A. *Sheppard III* App. 497-500, 508-09, 522-23, 554, 557-58, 576-77, 598-99, 602-04, 622, 630.)

To support his testimony about this latter form of misconduct, Petitioner formally requested from Respondent the jury charge documents he used in all of his criminal cases during Petitioner's tenure with him. Respondent admitted at his deposition that after receiving and reading the document request, he intentionally destroyed all of those documents

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[3]In its first dismissal decision, the District Court did not address Respondent's qualified immunity argument. While Petitioner asked the *Sheppard I* court to reach that issue, Respondent did not join in that request, and *Sheppard I* did not address the issue either.

instead of complying with the request. (App. 160a-168a.)

Petitioner sought to depose various witnesses to further corroborate his testimony about misconduct. However, the magistrate judge delayed the case for a total of more than a year by *sua sponte* raising the issue whether any such depositions would be proper, and ultimately ruled that Petitioner could not depose *any* current or *former* judges (aside from Respondent) or *law clerks* about the existence of any misconduct, and further severely restricted Petitioner's ability to depose current and former prosecutors on the subject. (App. 132a-147a.) Nevertheless, various prosecutorial supervisors testified to the accepted practice in their office of engaging in improper *ex parte* communications with judges and their law clerks. (App. 169a-200a.)[4]

Respondent testified that one of the reasons for the discharge was that Petitioner's allegations of misconduct were false. (C.A. *Sheppard III* App. 406-07.) Respondent also testified that one of the reasons was Petitioner's use of an expletive. However, Respondent testified that Petitioner did not apologize for the expletive, and that he could not say whether he would have discharged Petitioner had Petitioner apologized. (*Id.* at 403, 437.) Respondent himself would use expletives in chambers in Petitioner's presence, including referring to prosecutors as "miserable bastards." (*Id.* at 526.) Prior to the December 1990 argument, Respondent grudgingly had accepted Petitioner's rough way of objecting to some of Respondent's misconduct, and had altered his behavior to some extent in response to those objections. (*Id.* at 497-98, 507-09, 578, 600, 605, 610-11.)

Respondent testified that, minutes or hours before the discharge, he visited the administrative judge, who not only opined that Petitioner should be discharged, but insisted that Petitioner be removed from the courthouse. (*Id.*. at 409-10.) The administrative judge and his administrative assistant, on

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[4]Such improper communications are hardly limited to the county in which Respondent sat. Alan M. Dershowitz, *The Best Defense* 102 (1982); David Heilbroner, *Rough Justice: Days and Nights of a Young D.A.* 238 (1990); Mario Merola, *Big City D.A.* 32, 50 (1988).

the other hand, testified that Respondent merely had *phoned* the administrative judge, indicating that Petitioner *had been discharged* but refused to leave chambers, and that the administrative judge merely ordered that Petitioner be removed from *chambers*, as he had a right to remain in the courthouse. (*Id.* at 685-92.) The three court officers involved in the removal of Petitioner from the courthouse could not explain what the reason or purpose for the removal was, as Petitioner was behaving calmly during their interaction with him and he had a right to remain in the courthouse. (*Id.* at 816-20, 822, 827, 832, 858-60, 865-66, 869-70.) Those officers and other witnesses testified to the unprecedented nature of Petitioner's removal from the courthouse, and of the removal of a discharged law clerk from chambers without the clerk's first having the opportunity to gather his belongings. (*Id.* at 666, 670, 679-80, 684-85, 692-93, 701-02, 711-12, 718-19, 726, 814-15, 820-21, 823-24, 826, 828-30, 856-64, 866-67.)

Respondent testified that he knew nothing about any searches of Petitioner's office, or about Petitioner's being prevented from taking his belongings with him when he was removed from the courthouse. Respondent also denied knowing that Petitioner was prevented from taking his personal files with him when he returned to chambers to retrieve his belongings. While admitting that he removed Petitioner's personal file cards into his own office, he denied examining them.

Petitioner testified that during the argument--which took place in Respondent's office with no one else present--Respondent asked how he remembered Respondent's misconduct so well, and he replied that he had taken notes of courthouse events; when Respondent asked when he intended to go public, he responded that he did not know, but that he would go public if left with no options but to take part in misconduct, resign, or be fired. (*Id.* at 509-10, 518, 520-21, 525, 528, 559-60, 574, 629-30, 722-23, 1304 ¶ 9, 1309 ¶¶ 35-37.) Petitioner also testified that his notes--which he produced during discovery--focussed on the misconduct of others, not Respondent. Respondent testified that during the argument, there was no mention of any notes or going public.

A year after Respondent's summary judgment motion was deemed submitted, the District Court granted the motion. (App. 77a-117a.) In *Sheppard v. Beerman*, 317 F.3d 351 (2d Cir. 2003) [hereinafter *Sheppard III*], the Second Circuit affirmed that dismissal. (App. 22a-30a.)

Although Petitioner had contended throughout the litigation that Respondent discharged him for a number of improper reasons, including to punish him for his speech about misconduct, *Sheppard III* simply examined the question whether Respondent discharged Petitioner to deter Petitioner from making the misconduct public, and held that as a matter of law a public employer does not discharge an employee for that purpose where, as here, the employee confirms that he will publicize the misconduct if discharged. (App. 28a-30a.) Also, without addressing the issues of the truth of Petitioner's claims about misconduct, the seriousness of that misconduct, or the private nature of Petitioner's speech, and without allowing a jury to determine Respondent's motivations for the discharge, *Sheppard III* held that the discharge was proper because Petitioner uttered an expletive. (App. 27a-28a.) On March 11, 2003, the Second Circuit denied Petitioner's petition for rehearing and rehearing *en banc*. (App. 148a-149a.)

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S DECISIONS BELOW SERIOUSLY CONFLICT WITH CASES FROM THIS COURT AND OTHER CIRCUITS, AND CONSTITUTE HIGHLY UNDESIRABLE PUBLIC POLICY.

A. Office and Property Searches and Seizures

1. *Searches of Offices, Desks, and Filing Cabinets*

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), all nine Justices agreed that, at a minimum, a public employee has a reasonable expectation of privacy from searches of his or her office, desk, and file cabinets, unless, under the circumstances

of the employee's particular case, that expectation has been "reduced by virtue of actual office practices and procedures, or by legitimate regulation."[5] Here, the Complaint alleged,

> It is neither the policy nor custom of defendant or other New York judges to search their law clerk's office or seize any objects therefrom, except to the extent that materials belonging to the court or the judge, located in plain view or in file cabinets, might be briefly sought and removed as needed for legitimate court purposes . . . .

(App. 155a ¶ 29(a).) Despite *Ortega* and the Complaint, *Sheppard I* held that judicial law clerks have "'no reasonable expectation of privacy in chambers' appurtenances, embracing desks, filing cabinets or other work areas.'" (App. 8a (quoting App. 45a).) The court based its conclusion on its belief that "[t]he working relationship between a judge and her law clerk . . . is unique" (App. 8a), and that no judge's chambers could function properly unless the judge has complete access to everything to which the clerk has access (*id.*).

Obviously, *Sheppard I* ignores the minimum rule of *Ortega* that the employee's expectation of privacy must be addressed on a case-by-case basis, and can be reduced only because of actual office practices and procedures or legitimate regulation. Indeed, in scouring the cases cited in *Ortega* and *all* cases, federal or state, which have cited it over these 16 years, the undersigned has been unable to locate any

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[5]The four-judge plurality opinion stated that "the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis," 480 U.S. at 718, examining whether the employee's expectation of privacy has been "reduced by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* at 717. Judge Scalia, concurring in the judgment, took the position that *all* government employees have a reasonable expectation of privacy in their offices, desks, and filing cabinets unless their offices are subject to unrestricted public access. *Id.* at 730-32. The four-justice dissent also found the plurality opinion to be too restrictive of public employees' rights to privacy in their offices, desks, and filing cabinets. *Id.* at 737-41.

case other than *Sheppard I* in which it even was argued, much less held, that a certain class of government employees has no reasonable expectation of privacy in their offices, desks, or file cabinets regardless of the policies or customs in their particular workplaces.[6] This is true even as to law enforcement or military employees,[7] even though they traditionally have received less Fourth (and First) Amendment protection than over government employees.[8]

In light of both *Ortega* and common sense, it is simply untenable that no judicial chambers could function unless the judge has free reign to go through the law clerk's office, desk, and filing cabinets without restraint. Indeed, the District Court below, unlike the Second Circuit, apparently believed that only judges in "large metropolitan areas" need such free reign. (App. 44a-45a.) Nor is it reasonable to take the position that if, because of the particular duties, needs, beliefs, relationships, policies, or practices of the judge, law clerk, or judicial system in question, certain judges in fact are able to manage without having such intrusive access into their law clerk's work areas, then such law clerks should not then have the benefit of the Fourth Amendment's protection.

Moreover, *Sheppard I* singled out judicial chambers for unique treatment because of the flow of written and oral confidential information constantly exchanged between judges and their law clerks. (App. 8a.) But how is this different from the flow of such information in many executive or legislative offices? Indeed, in *Forrester v. White*, 484 U.S. 219 (1988), this Court not only rejected the notion that

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[6]Indeed, the position was not even initially argued by Respondent, but was raised and decided *sua sponte* by the District Court. (App. 44a-45a.)

[7]*United States v. Taketa*, 923 F.2d 665, 672-73 (9th Cir. 1991); *Shields v. Burge*, 874 F.2d 1201, 1202-05 (7th Cir. 1989); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1333-35 (9th Cir. 1987); *United States v. Neal*, 41 M.J. 855, 860-61 (A.F. Ct. Crim. App. 1994); *United States v. Craig*, 32 M.J. 614, 615 (A.C.M.R. 1991).

[8]*Ortega*, 480 U.S. at 745 n.2 (Blackmun, J., dissenting); *Brown v. Glines*, 444 U.S. 348, 353-58 (1980); *United States v. Chapman*, 954 F.2d 1352, 1366-71 (7th Cir. 1992); *Williams v. Bd. of Regents*, 629 F.2d 993, 1003 (5th Cir. 1980).

judges, and only judges, should received absolute immunity from damages for their decisions to hire and fire confidential employees, but rejected the position taken by the Seventh Circuit in that case that a judge's need for confidence in his or her employees distinguishes judges from other public officials, *id.* at 229-30, and cautioned judges not to be overly protective of their own situations in comparison to the situations of other government employers about which they know less, *id.* at 226, and who in fact may deserve *greater* protection than judges, *id.* at 230. Indeed, as a former federal judge has written, not only have different justices of this very Court relied on their law clerks to very different degrees, but some justices of this Court have relied on their law clerks less than their counterparts in government have relied on their confidential employees. Marvin E. Frankel, *A Matter of Opinions*, N.Y. Times, May 15, 1994, § 4, at 15.

2. *Seizures and Searches of Personal Property*

While this Court in *Ortega* generally left open the question of the Fourth Amendment restrictions on a government employer's seizure or search of an employee's property, 480 U.S. at 729 n.* (plurality opinion); *see id.* at 747-48 n.14 (Blackmun, J., dissenting), that case had three important things to say on the subject. First, even the plurality, while stating that employees have no reasonable expectation of privacy in the exterior portions of belongings exposed to open view in an office, desk, or filing cabinet where an otherwise legitimate search is taking place, nevertheless unquestionably retain a reasonable expectation that an employer will not seize or search a handbag, briefcase, or closed personal luggage without probable cause. *Id.* at 716. Second, while the plurality and Justice Scalia's concurrence did not address the issue, the four-justice dissent took the position that the seizure or search of personal property, and particularly the inspection of private papers, during the search of an office, desk, or filing cabinet requires greater justification than the initial search. *Id.* at 738 n.5, 747-48 n.14. Third, the implication in all of the *Ortega* opinions is that

since the search of an office, desk, or filing cabinet can be justified only if its purpose *in fact* was a legitimate, work-related one--and thus, a search purportedly effected to prevent the confiscation or destruction of the employer's property by a discharged or suspended employee can be justified only if a policy or practice permits such a search *and* the search *in fact* was effected for that purpose[9]--then the seizure or search of property which *in fact* was not effected for such a purpose would be violative of the Fourth Amendment. *Id.* at 723, 725-28 (plurality opinion); *id.* at 732 (Scalia, J., concurring); *id.* at 732-48 (Blackmun, J., dissenting).

Thus, in general, this Court has recognized that: searches or seizures of private property are reasonable only if effected *in fact* for legitimate governmental purposes, *New Jersey v. T.L.O*, 469 U.S. 325, 335 (1985); *United States v. Place*, 462 U.S. 696, 703-06 (1983); special justification is required for the examination of private papers;[10] and separate justification is required to search or seize private property discovered as a result of a proper initial search or seizure. *Arizona v. Hicks*, 480 U.S. 321, 324-29 (1987); *United States v. Chadwick*, 433 U.S. 1, 3-5, 11-16 (1977). Accordingly, in the wake of *Ortega*, federal courts have held that a government employer's seizure or search of an employee's personal documents is covered by *Ortega*'s general reasonable expectation analysis,[11] and that, under *Ortega*, a search or seizure of a public employee's written or oral statements is constitutional only

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[9] *Accord United States v. Fernandes*, 272 F.3d 938, 942-43 (7th Cir. 2001).

[10] *Zurcher v. Stanford Daily*, 436 U.S. 547, 563-64 (1978); *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976); *Fisher v. United States*, 425 U.S. 391, 401 n.7 (1976); *Stanford v. Texas*, 379 U.S. 476 (1965). This is particularly so where, as here, "the basis for the seizure is disapproval of the message contained therein." *Walter v. United States*, 447 U.S. 649, 655 (1980) (Stevens, J., announcing the judgment of the Court).

[11] *Stewart v. Evans*, 275 F.3d 1126, 1129-31 (D.C. Cir. 2002) (employee's notes of employers' misconduct); *United States v. Mancini*, 8 F.3d 104, 108-10 (1st Cir. 1993) (appointment calendar, containing personal and work-related entries, maintained in office archives and accessible to secretary).

if effected *in fact* for a legitimate, work-related reason.[12]

But in *Sheppard I*, the Second Circuit acted contrary to all of these cases from this Court and elsewhere. The Complaint alleges that: "[i]t is neither the policy nor custom of defendant or other New York judges when firing a law clerk, to physically remove him from the courthouse or deny him the opportunity to gather his belongings before others intrude upon his office and property therein" (App. 155a ¶ 29(b)); nevertheless, upon being advised of his discharge, Petitioner was also advised that he could not take his belongings with him at that time (App. 154a ¶ 22); Respondent removed Petitioner's personal file cards and examined them (App. 154a-155a ¶ 24-25); when Petitioner returned to chambers two days later, he was not permitted to take his personal files until Respondent had four additional days to examine them (App. 155a ¶ 26-27); and Respondent effected these seizures and searches for the purpose of finding and confiscating Petitioner's notes of Respondent's misconduct (App. 153a ¶ 18(a)).[13]

Petitioner clearly argued to both courts below that on the basis of *Ortega* and these allegations, the seizures and searches of his property violated the Fourth Amendment. (*E.g.*, Pet. C.A. *Sheppard I* Br. 25-27.) Yet *Sheppard I*, agreeing with the District Court (App. 43a-44a), held, "Because a judicial employer has an overriding interest in securing the confidentiality of chambers' work product and in making sure that an angry clerk does not attempt to confiscate or destroy important court property, the brief alleged withholding of Sheppard's belongings while they

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[12] *United States v. Gonzalez*, 300 F.3d 1048, 1055 (9th Cir. 2002) (employee's signing consent to search of backpack for theft does not entail consent to read employee's papers in backpack); *Ortega v. O'Connor*, 146 F.3d 1149, 1152, 1159-64 (9th Cir. 1998); *Walker v. Darby*, 911 F.3d 1573, 1579 n.8 (11th Cir. 1990) (employers bugged employee's office conversations in pursuit of their personal vendetta against him).

[13] Respondent testified that there were no searches of Petitioner's property, and that he was permitted to take his belongings with him at the time of his discharge. *See supra* p. 8,

were searched was not unreasonable." (App. 9a.) This language would even permit an automatic right to search, and closely examine the contents of, a discharged employee's handbag or briefcase.

Indeed, since *Sheppard I*s holding that law clerks have no reasonable expectation of privacy in their offices, desk, and file cabinets is based on the necessity that there be "an absolutely free flow of information between the clerk and judge" (App. 8a), it would follow that law clerks have no reasonable expectation of privacy in their belongings--which might contain or appear to be court files or "the clerk's notes from discussions with the judge" (App. 8a)--even when they are not discharged. This would include their handbags, briefcases, and closed luggage, as law clerks sometimes take work-related documents home or on vacation.

3. *The Advent of Office Computers*

The holdings in *Sheppard I* regarding the searches of Petitioner's office, desk, and file cabinets, and the subsequent seizure and search of his personal property, is particularly troublesome in light of the extent to which public employees are now furnished computers. Computers are largely the modern version of the desk and filing cabinet. They contain office-related files and information, but also personal files and information. While some circuit courts, citing *Ortega*, have held that a public employer may seize, search, or monitor computers where the employee is given advance notice of a policy so permitting, or where the seizure or search *in fact* is effected for a legitimate work-related purpose,[14] the logic of *Sheppard I* would allow judges unrestrained access under the Fourth Amendment to *everything* in the law clerk's computers and disks, not only in the

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[14] *United States v. Slanina*, 283 F.3d 670, 677-80 (5th Cir.), *vacated on other grounds*, 123 S. Ct. 69 (2002); *Muick v. Glenayre Elecs.*, 280 F.3d 741, 742-43 (7th Cir. 2002) (Posner, J.); *United States v. Simons*, 206 F.3d 392, 398-401 (4th Cir. 2000); *United States v. Johnson*, 16 F.3d 69, 71, 73-74, *rehearing granted on other grounds*, 18 F.3d 293 (5th Cir. 1994).

absence of such an announced policy, but even in the *presence* of policies and practices seemingly providing some privacy protection for the law clerk. Indeed, in *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001), in finding that a government employee had a reasonable expectation of privacy in personal information stored in his office computer in the absence of an announced policy to the contrary, the Second Circuit contrasted *Sheppard I* in that there is a "'unique' relationship between a judge and her clerk necessitating a 'distinctive open access to documents.'" *Id.* at 74 (quoting App. 8a).

In fact, in an open letter to federal judges dated September 4, 2001, federal circuit judge Alex Kozinski wrote that proposed rules removing the privacy of federal judicial employees, including judges and their law clerks, in all information in their office computers--including personal e-mails and prescriptions filled online--would give "'employers a near-Orwellian power to spy and snoop into the lives of their employees'" (quoting a fellow judge), causing "loyalty and dedication [to] wilt." Thus, it is likely that the removal of the privacy of a law clerk would hinder, not help, "an absolute free flow of information between the clerk and the judge" which *Sheppard I* found so vital. (App. 8a.)

Moreover, *Sheppard I* based its holding that a law clerk has no reasonable expectation of privacy in his or her office, desk, or filing cabinets on the need for that "an absolute free flow of information" and for the judge's concomitant "access to the files and papers kept by the clerk," including "the clerk's notes from discussions with the judge" (App. 8a.) Accordingly, it would seem that a judge also has no reasonable expectation of privacy in his or her own office, desk, or file cabinets--or, for that matter, computer or personal belongings in chambers--in light of that absolute need for the free flow of information between judge and clerk, and because the law clerk, in drafting opinions and performing other tasks, needs full access to all files and the judge's notes from discussions with the clerk.

B. Forcible Movements of Persons

The clear rule from this Court is that an officer seizes an individual for Fourth Amendment purposes if, based on the officer's conduct and/or statements, a reasonable person would not have felt free to ignore the officer, terminate the encounter, and go about his or her business.[15] Thus, if an officer tells a person to move from one location to another and a reasonable person would feel compelled to obey, then the officer has seized the person.[16]

Although Petitioner argued to both courts below that he was seized when armed court officers forced him to accompany them from Respondent's chambers to the outside of the courthouse building, *see supra* p. 5, *Sheppard I* held that Petitioner was not seized because he "was 'free to go anywhere else that he desired,' with the exception of Beerman's chambers and the courthouse." (App. 9a (quoting App. 45a n.3).) Obviously a person ordered by armed court officers to accompany them out of a courthouse is not free to ignore them and remain in the courthouse. Indeed, the logic of *Sheppard I* would remove all Fourth Amendment restraints on the ability of government officers to force persons to move out of buildings,[17] into buildings,[18] or generally from one location to another,[19] regardless of the duration of the

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[15] *United States v. Drayton*, 536 U.S. 194, 122 S. Ct. 2105, 2111-12 (2002); *California v. Hodari D.*, 499 U.S. 621, 628 (1991); *Florida v. Bostwick*, 501 U.S. 429, 434-37, 439 (1991); *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988).

[16] *United States v. Mendenhall*, 446 U.S. 544, 548, 557-58 (1980) (plurality opinion); *Dunaway v. New York*, 442 U.S. 200, 207 (1979); *Sibron v. New York*, 392 U.S. 40, 45, 63 (1968).

[17] *Contra Sibron*, 390 U.S. at 45, 63 (movement out of restaurant); *Jones by Jones v. Webb*, 45 F.3d 178, 180-82 (7th Cir. 1995) (movement out of house). In *Robinson v. Town of Colonie*, 878 F. Supp. 387, 392-93 (N.D.N.Y. 1995), the court held that *Sheppard I* "dictate[d]" its ruling that as a matter of law, a customer is not seized when ordered by the police to leave a store.

[18] *Contra Dunaway*, 442 U.S. at 207 (movement into police station).

[19] *Contra Mendenhall*, 446 U.S. at 548, 557-58 (no seizure because person consented to move to another location 50 feet away in same building); *United States v. Chavez*, 281 F.3d 479, 482, 484 (5th Cir. 2002) (no seizure

move[20] or the number of moves required,[21] as long as the person is allowed, for some unspecified period of time, to go about his or her business after the move.

C. Exclusion of Citizens from Courthouses

Unquestionably, members of the public have a First Amendment right of access to criminal proceedings to ensure that such proceedings are conducted fairly and properly, and that right may be abridged only for legitimate, compelling governmental purposes.[22] The Complaint clearly indicates that Respondent had court officers forcibly remove Petitioner from the courthouse and prevent his reentry, not for any legitimate governmental purpose, but to enable Respondent to search for and seize any notes of misconduct in criminal proceedings Petitioner may have brought with him to work that day; to punish Petitioner for his speech about the misconduct; and to lessen the likelihood that the public would learn about or take action against the misconduct.

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because person consented to move across parking lot); *United States v. Sanchez*, 89 F.3d 715, 717-18 (10th Cir. 1996) (same); *United States v. Little*, 60 F.3d 708, 711, 714 (10th Cir. 1995) (movement from one area of airport terminal to baggage claim area); *Orhorhaghe v. INS*, 38 F.3d 488, 491-96 (9th Cir. 1994) (movement from hallway into person's apartment); *Morgan v. Woessner*, 997 F.2d 1244, 1252-54 (9th Cir. 1994) (movement of ten feet).

[20] *Contra United States v. Madrid*, 30 F.3d 1269, 1270-77 (10th Cir. 1994) (no seizure because person voluntarily consented to be driven into town).

[21] *Contra United States v. Weaver*, 282 F.3d 302, 307, 311-13 (4th Cir.) (no seizure because person consented to be driven in patrol car to two different banks), *cert. denied*, 123 S. Ct. 186 (2002); *United States v. Grant*, 920 F.2d 376, 378-79, 384 (6th Cir. 1990) (seizure when police continued to question person on plane despite his changing seats, and another seizure when police forced him to leave plane).

[22] *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 3, 7, 9, 13-14 (1986); *Waller v. Georgia*, 467 U.S. 39, 44-48 (1984) (unanimous decision); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 510-13 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 598, 603-11 (1982).

(App. 150a, 153a-154a ¶¶ 1, 18, 20-23.)[23] Petitioner argued to both courts below that his First Amendment right to attend criminal proceedings therefore was infringed. *See supra* p. 5. Yet both *Sheppard I* (App. 6a-7a, 9a) and the District Court (App. 42a-43a) dismissed this argument without even addressing it. (App. 6a-7a, 9a, 42a-43a.)

D. Discharge in Violation of Free Speech

1. *Motivation of Employer in* Prima Facie *Case*

Sheppard III recognized that if Respondent discharged Petitioner out of a concern for the content of his speech about misconduct, then Petitioner would have made out a *prima facie* case of a discharge in violation of the First Amendment and the *Pickering* balancing defense[24] would be unavailable. (App. 26a-27a.) *Sheppard III* disposed of the problem in two steps: first, by ignoring Petitioner's contentions that the among the motivations for the discharge were a desire to punish Petitioner; to prevent him from further learning of or objecting to misconduct; to lessen the likelihood that others would believe or assist him; and to deter others from objecting to, or blowing the whistle on, misconduct in the future; and second, by holding that as a matter of law, a public employer who discharges an employee after obtaining confirmation from the employee that the employee will go public if discharged cannot have discharged the employee for the purpose of deterring the employee from going public, since a discharge invites publication. This solution is contrary to this Court's decisions and even the decisions of the courts below earlier in this case, and creates highly undesirable public policy.

a. *Illegal Motivations*

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[23]Neither Respondent nor anyone else involved with removal of Petitioner from the courthouse could articulate at his or her deposition a reason for that removal. *See supra* pp. 7-8.

[24]*Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

This Court has made clear that the forbidden motivations for disciplining a public employee for his or her speech include, not only the desire to deter the employee from going public, but also punishing the employee and deterring others from emulating the employee.[25] Not only did the Complaint (*e.g.*, App. 150a, 153a ¶¶ 1, 18) and Petitioner's various submissions below (*e.g.*, Pet. C.A. *Sheppard III* Br. 2, 31-34, 43) explicitly indicate that all of these forbidden motivations--particularly the retaliation motivation--were involved in this case, but the earlier decisions of the Second Circuit (App. 1a, 16a), the District Court (App. 57a, 60a, 145a), and the Magistrate Judge (App. 119a, 134a, 141a) explicitly acknowledged this. Yet *Sheppard III* wrongly stated, "At its core, Sheppard's argument is that he was terminated because he threatened to go forward and expose Beerman's corruption," and only addressed the question whether Respondent discharged Petitioner to deter him from going public. (App. 29a-30a.)

b. *Confirming Willingness to Go Public*

Petitioner testified at his deposition that during the argument, Respondent asked him how he remembered Respondent's misconduct so well, and he replied that he had taken notes of courthouse events; when Respondent asked him when he intended to go public, he responded that he did not know, but that he would go public if left with no options but to take part in misconduct, resign, or be fired. *See supra* p. 8. *Sheppard III* held that Petitioner's contention that Respondent discharged him to deter him from going public "'is *disproved*, rather than proved, by the act of termination, since that act, as described by Sheppard, was akin to an invitation to speak.'" (App. 29a (quoting App. 104a) (emphasis in District Court).)

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[25] *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Waters v. Churchill*, 511 U.S. 661, 669 (1994) (plurality opinion); *id.* at 683 (Souter, J., concurring); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick v. Myers*, 461 U.S. 138, 144-45 (1983).

Every case from this Court involving a public employer's adverse action against an employee allegedly in violation of free speech has been a termination case.[26] Also, this Court has expressed a preference that the employee at least initially engage in private speech, as such speech is less likely to disrupt the legitimate work of the office. *Rankin v. McPherson*, 483 U.S. 378, 388 n.13 (1987); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570 (1968). Other circuits repeatedly have struck the *Pickering* balance in favor of whistleblowers and potential whistleblowers. *See infra* pp. 22-23 note 28.

But *Sheppard III* undermines all of these cases, allowing a public employer engaged in misconduct to discharge an employee who has privately expressed concern about the misconduct, simply by eliciting from the employee the obvious response that the employee will go public if discharged, with the employer safe in the knowledge that a federal court ultimately will uphold the discharge by holding as a matter of law that an employer would not discharge an employee to silence the employee because a discharge only invites publication.

2. *The Balancing Defense*

Because Petitioner adduced sufficient evidence for a jury to find that a substantial or motivating factor in the discharge was Respondent's desire to punish him for his speech about Respondent's misconduct or inhibit future activity along those lines, Respondent nevertheless was entitled to summary judgment if he established as a matter of law that the value of that speech was outweighed by the foreseeable disruption the speech would cause to the legitimate running of the office. *Waters v. Churchill*, 511 U.S. 661, 673-81 (1994) (plurality opinion); *Rankin*, 483 U.S. at 388; *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285, 287 (1977)

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[26]Cases cited in preceding note; *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Perry v. Sindermann*, 408 U.S. 503 (1972); *Pickering*, 391 U.S. 563.

(unanimous decision). In several important ways, *Sheppard III* considered this balancing issue in a manner profoundly at odds with decisions from this Court and other circuit courts.

a. *Private, Truthful Speech About Misconduct*

Petitioner spoke to Respondent in the privacy of Respondent's office, *see supra* p. 8, providing an important factor in Petitioner's favor. *Rankin*, 483 U.S. at 388 n.13 ("a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee"); *Pickering*, 391 U.S. at 570. The subject of Petitioner's speech--ongoing, serious, widespread judicial and prosecutorial misconduct--is a matter of utmost public concern.[27] The stronger the public interest in the employee's speech, the greater the justification needed for the employer to prevail in the *Pickering* balancing. *Connick v. Myers*, 461 U.S. 138, 152 (1983). Another important factor in the balancing is whether the employee's speech is true, or at least not knowingly or recklessly false, particularly where, as here, the employer cites the falsity of the speech as a ground for the discharge. 391 U.S. at 568-75, 578-82. Where, as here, the employee's speech concerns the employer's misconduct, circuit courts routinely strike the balance in the employee's favor--indeed, even where the employee speaks publicly; for in such situations, the employee's speech is clearly in the public interest, and it is the employer's misconduct, and his or her attempt to punish or suppress the employee's speech, which is contrary to the public interest.[28] Although Petitioner repeatedly brought

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[27] *Connick*, 461 U.S. at 148-49; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion);*Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

[28] *E.g., McVey v. Stacy*, 157 F.3d 271, 274, 280, 282 (4th Cir. 1998);; *Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215, 1217-21 (7th Cir. 1994); *O'Connor v. Steeves*, 994 F.2d 905, 906-09, 915-17 (1st Cir. 1993); *Wulf v. City of Wichita*, 883 F.2d 842, 846-55, 861-62 (10th Cir. 1989);*Roth v. Veteran's Admin.*, 856 F.2d 1401, 1407-08 (9th Cir. 1988);*Solomon v. Royal Oak Township*, 842 F.2d 862, 863-66 (6th Cir. 1988);*Marohnic v.*

these facts and legal principles to the attention of the courts below (*e.g.*, Pet. C.A. *Sheppard III* Br. at 39-45), neither *Sheppard III* (App. 27a-28a) nor any of the other opinions of the Second Circuit or the District Court took cognizance of them.

b. *Confidential Nature of Relationship*

Instead, *Sheppard III* held, "Where an employee, such as Sheppard, 'holds an extremely confidential or highly placed advisory position, it would be unlikely [for] the *Pickering* balance to be struck in his favor.'" (App. 28a (quoting *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997)) (alteration in *Sheppard III*).) But this Court has never even suggested that the confidential or high-level nature of the employee's position creates a presumption against the employee's succeeding in the *Pickering* balancing. In *Pickering* itself, this Court noted that the highly confidential nature of the employment relationship "might" tip the balance for the employer where, unlike here, the employee engaged in "public," as opposed to private, speech. 391 U.S. at 570 n.3. In *Rankin*, this Court stated *one* of the factors in the balancing is whether the speech "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary," 483 U.S. at 377, and that "[w]here . . . an employee serves no confidential, policymaking, or public contact role, the danger to an agency's successful functioning from that employee's private speech is minimal," *id.* at 390-91. But the Court did not suggest that this factor alone created any presumption against the employee; indeed, any presumption mentioned in that case was *in favor* of the employee. *Id.* at 388 n.13 ("a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee"). In *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 716-19, 726 (1996), this Court recognized that the confidential/policymaking exception to government employment

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Walker, 800 F.2d 613, 614, 616 (6th Cir. 1986) (per curiam).

decisions based on political association is distinct from the *Pickering* balancing test. And in *Connick*, while noting the political association cases, 461 at 142, 149, this Court analyzed the *Pickering* claim of an assistant district attorney--a highly confidential employee with great public contact whose position often depends on political association--in the standard manner. *Id.* at 142-54.

Moreover, in *Waters*, 511 U.S. at 674, this Court stated, "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Accord Bd. of City Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). How much truer is this of the confidential or high-level employee, who, as here, is in the best position--indeed, the only position--to offer not only informed opinions, but actual facts about the employer's misconduct?

Some circuits have held that even where the employee's position requires political association and the employee speaks publicly, the general *Pickering* balancing is performed. *Brady v. Fort Bend County*, 145 F.3d 691, 704-10 (5th Cir. 1998); *Horton v. Taylor*, 767 F.2d 471, 479-81 (8th Cir. 1985). Others have applied a presumption against the government employee simply because his or her position requires political association, *Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1331-32 (9th Cir. 1997), or because the position requires political association *and* the speech involved that association in some manner, as opposed to being about the employer's misconduct.[29]

But none of the circuits other than the Second engage in a presumption against the government employee simply

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[29] *Rose v. Stephens*, 291 F.3d 917, 920-23 (6th Cir. 2002); *Barker v. Del City*, 215 F.3d 1134, 1139 (10th Cir. 2000); *Bonds v. Milwaukee County*, 207 F.3d 969, 976-82 (7th Cir. 2000); *McVey*, 157 F.3d at 277-82; *Flynn v. City of Boston*, 140 F.3d 42, 46-47 (1st Cir. 1998); *Cutliffe v. Cochran*, 117 F.3d 1353, 1355, 1358 & n.5 (11th Cir. 1997); *Hall v. Ford*, 856 F.2d 255, 258-65 (D.C. Cir. 1988).

because, like Petitioner,[30] he or she holds a confidential position, particularly where, as here, the employee's speech was in private and concerned the employer's misconduct. In fact, other circuits strike the *Pickering* balance in favor of confidential, policymaking, or high-level employees where the speech concerns the employer's misconduct--indeed, even where the employee speaks publicly. *See, e.g.*, cases cited *supra* pp. 22-23 note 28.

c. *Irrelevance of the Expletive*

Aside from the improper presumption, the only other factor upon which *Sheppard III* relied to strike the balance against Petitioner was his use of an expletive during the heated argument. (App. 27a-28a.) But, as Petitioner argued to both courts below, his position is that the protected speech which was a substantial or motivating factor in the discharge was his speech about misconduct, not the expletive. (*E.g.*, Pet. C.A. *Sheppard III* Br. 2, 28, 30-32, 40-42.) Thus, a jury must decide whether his position is correct about the motivations for the discharge, and then the court would determine whether Respondent has sustained his burden of proving that the disruption of the proper running of the office that would likely flow from that speech outweighed the value of the speech[31]--a balancing clearly in Petitioner's favor in light of the truth, value, and private nature of the speech.[32]

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[30]In New York, judges "shall exercise the power of appointment impartially and on the basis of merit," N.Y. Comp. Codes R. & Regs. tit. 22, § 100.3(C)(3) (2002); "shall not be swayed by partisan interests" in discharging their adjudicative responsibilities, *id.* § 100.3(B)(1); and are required to refrain from a large variety of political activities, *id.* § 100.5.

[31]*Waters*, 511 U.S. at 677, 679-82; *Connick*, 461 U.S. at 140-41, 148-50; *Mt. Healthy*, 429 U.S. at 281-87.

[32]While the expletive might be relevant to the defense that Respondent would have discharged Petitioner in any event, *Mt. Healthy*, 429 U.S. at 287, Respondent did not argue, and *Sheppard III* did not address, that defense, which would have involved a jury issue had it properly been raised.

II. MANY ADDITIONAL CONSIDERATIONS COALESCE TO MAKE THE GRANT OF CERTIORARI CRITICALLY IMPORTANT

A. This Is Most Likely the Court's Only Chance to Address The Issues Concerning the First and Fourth Amendment Rights of Law Clerks

Lawsuits against judges based on their employment decisions are uncommon. *See Forrester v. White*, 792 F.2d 647, 663 (7th Cir.) (Posner, J., dissenting), *rev'd*, 484 U.S. 219 (1988). The chances of a law clerk's suing a judicial employer are even smaller in light of the harm such a lawsuit could do to the clerk's career. Indeed, even with this Court's 1988 *Forrester* decision permitting damages actions against judges for their employment decisions and *Sheppard I*'s 1994 ruling ostensibly permitting law clerks to sue judges under *Forrester*, the undersigned has been unable to find any other case, state or federal, before or after 1988 in which a law clerk sued a judicial employer on any grounds. And now that the lower courts through their various published decisions in this case have reinforced the notion that a law clerk's attempts to correct improprieties of the part of the judiciary will only serve to hurt the law clerk's career (*e.g.*, App. 36a, 45a n.3; Pet. *Sheppard III* C.A. Br. 20-22, 27-28), it is hard to imagine that there will ever again be litigation before this Court which will enable it to review such questions as the right of privacy of law clerks and the right of law clerks to object to judicial misconduct, much less to correct the damage done by *Sheppard I* and *Sheppard III*.

B. No One Else Will Deal With Clandestine, Improper Attempts by Judges and Prosecutors to Obtain Convictions

Nor is there any reason to believe that the problems raised in Petitioner's speech will be addressed properly by anyone other than this Court. The New York Commission on Judicial Conduct has been described as a "quasi-indepen-

dent" body that bends to the winds blown by those at the highest levels of power in New York. Joyce Purnick, *Judge Wins This Round by Losing*, N.Y. Times, Apr. 24, 1996, at B1. A prosecutorial supervisor testified at his deposition that even his office does not complain to that commission or appellate judges about trial judges who engage in misconduct because judges "want to protect their own," and because a complaint would only result in retribution. (App. 178a-181a.) The New York State Bar Association recently rejected a proposal that lawyers be required to report serious misconduct on the part of judges, as the lawyers feared retribution from judges on whom they might report. Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges--A Proposed Solution to the Real Problem*, 25 Hofstra L. Rev. 729, 729-30 (1997). Various judges and law clerks testified at their depositions to their inability to recall situations in which: New York Supreme Court justices were disciplined for improper conduct in criminal cases; New York judges reported prosecutors to attorney disciplinary committees; or New York prosecutors were disciplined by such committees for actions taken as prosecutors.

Nor is there any reason to believe that the press will do anything. As a fellow Stanford law graduate and then primary *New York Times* legal columnist advised Petitioner a year *prior* to Petitioner's discharge, the press is not interested in judges who violate their oaths *against* criminal defendants. (*Id.* at 503-04.)

C. There Is No Reason to Believe These Problems Are Limited to New York

Nor is there any reason to believe that the problems raised in Petitioner's speech exist only in New York. In recent times, judges in Chicago and Philadelphia on a mass scale have committed crimes to help criminal defendants. Why would it come as any surprise, then, that judges would violate their oaths *against* criminal defendants, where the press is uninterested, the judges need commit no crimes, and prosecutors are actually involved in the misconduct? Indeed,

mass judicial misconduct takes place because judges, lawyers, and members of the press who know about it keep silent. Mervin Block, *Judges and the Press: The Power to Suppress*, 16 Loy. U. Chi. L.J. 445, 445-49 (1985); Anthony R. Valukas, *The Lesson of Greylord: Many Lawyers and Judges Tolerate Brethren Who Cheat and Lie*, 14 B. Leader 13, 14 (May-June 1986). As Judge Posner has observed, "'Judges tend to be rather clubby. Even when there are severe ideological disagreements, they tend to close ranks against the outside world.'" Christine C. Biederman, *In Center of Judicial Storm Is a Federal Judge in Texas*, N.Y. Times, Nov. 5, 1995, § 1, at 24. Nor do prosecutors have any cause to fear repercussions from their misconduct against criminal defendants. Monroe H. Freedman, *Professional Discipline of Prosecutors: A Response to Professor Zacharias*, 30 Hofstra L. Rev. 121 & articles cited therein (2001).

D. Denial of Certiorari Will Proliferate Misconduct

In *Mapp v. Ohio*, 367 U.S. 643, 659 (1961), this Court approvingly quoted most of the following language from Justice Brandeis's famous dissent in *Olmstead v. United States*, 277 U.S. 438 (1928):

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against this pernicious doctrine this Court should resolutely set its face.

Id. at 485. Violations of the Constitution and other laws on the part of judges and prosecutors only breed or necessitate still further violations and false denials thereof on the part of themselves and their colleagues. Indeed, now that, through this lawsuit, Petitioner has managed to air some of the issues

to some extent, if this Court does not grant certiorari to set right what the lower federal courts have said and done in this case, how much more likely will it be that judges and prosecutors, including some who may not have indulged before, will engage in misconduct of the sort concerned herein, not only safe in the knowledge that the federal courts will do nothing to intercede, but with those courts' implicit approval of such misconduct?

E. The Misconduct at Issue Does Not Harm Only *Guilty* Criminal Defendants

When this Court stated in *Mapp* that "[t]he ignoble short cut to conviction left open to the States tends to destroy the entire system of constitutional restraints on which the liberties of the people rest," it was referring to Fourth Amendment violations. 367 U.S. at 660. But the types of constitutional violations involved here--judges taking various surreptitious steps, including ex parte communications with prosecutors, to enhance the likelihood of conviction[33]--create the risk of convicting innocent persons. Indeed, not only is this risk present where judges and prosecutors--who by definition do not have all available information prior to trial--decide to violate the law to increase the chances of convicting a person *they believe to be guilty*,[34] but such improper behavior is hardly limited to such situations. Here, for example, in one of the two cases in which Respondent was engaging in misconduct at the time of Petitioner's discharge, Respondent had announced to Petitioner his intention to do all he could to ensure the defendant's conviction as soon as

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[33] *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2535 (2002); *Yohn v. Love*, 76 F.3d 508, 516-17 (3d Cir. 1996); *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1982).

[34] In the case which was the immediate impetus of the argument between the parties, after the ex parte attempt by Respondent and the State to have an immediate murder trial was thwarted by Petitioner's actions, the State ultimately dismissed the charges against the defendant, who would have received a life sentence if convicted.

Respondent learned of the defendant's rearrest, as Respondent was angry about the rearrest. *See supra* pp. 2-3; *Liteky v. United States*, 510 U.S. 540, 555 (1994).

The exoneration of wrongfully convicted defendants normally is the product of pure luck. James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2048-51 n.84 (2000). But the sorts of constitutional errors involved herein will never surface in individual cases, much less en masse, unless an insider like Petitioner blows the whistle. The problem is exacerbated by the many procedural roadblocks erected by this Court to habeas corpus petitions on the assumption--rendered dubious by the instant case--that state judges and prosecutors conscientiously attempt to follow federal law, *e.g., Brecht v. Abrahamson*, 507 U.S. 619, 635-36 (1993), and by this Court's recent decision in *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), which removes state-imposed barriers to judicial candidates' campaign statements about the likelihood that criminal defendants before them will be convicted. *See id.* at 2536 n.7, 2538-39; *id.* at 2542 (O'Connor, J., concurring); Liebman, *supra*, 100 Colum. L. Rev. at 2069 & n.115, 2111-14.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 2003

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No. _____

IN THE

Supreme Court of the United States

BRIAN SHEPPARD,

Petitioner,

v.

LEON BEERMAN,
as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SECOND CIRCUIT'S 1994 DECISION (*SHEPPARD I*)

United States Court of Appeals,
Second Circuit.

Brian SHEPPARD, Plaintiff-Appellant,
v.
Leon BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York, Defendant-Appellee.

No. 536, Docket 93-7658.

Argued Nov. 2, 1993.
Decided March 3, 1994.

Brian Sheppard, New Hyde Park, N.Y., *Pro Se*.

John J. Sullivan, Assistant Attorney General of the State of New York, New York, N.Y. (Robert Abrams, Attorney General of the State of New York, Albany, N.Y., of counsel), for *Defendant-Appellee*.

Before: OAKES, KEARSE, and ALTIMARI, *Circuit Judges*.

ALTIMARI, *Circuit Judge*:

Plaintiff-appellant Brian Sheppard, appearing *pro se*, appeals from a judgment of the United States District Court for the Eastern District of New York (Glasser, *J.*), dismissing his complaint on the pleadings pursuant to Fed. R. Civ. P. 12(c) ("Rule 12(c)"). Sheppard, a law clerk to defendant-appellee Leon Beerman, a justice of the Supreme Court of the State of New York, was discharged following a heated dispute with Beerman. Sheppard subsequently brought an action under 42 U.S.C. § 1983 (1988) alleging that his discharge and Beerman's conduct following the discharge violated his First and Fourth Amendment rights. In his complaint, Sheppard claimed that he was fired in "retaliation for [his] protesting, and [sic] considering to expose, judicial misconduct." He further alleged that subsequent to the discharge, Beerman

illegally searched his office and seized his belongings. The district court dismissed Sheppard's claims on the pleadings, finding that he failed to state any cognizable constitutional claims. On appeal, Sheppard challenges the dismissal of each of his claims, generally arguing that the district court made certain improper factual findings in ruling on Beerman's Rule 12(c) motion to dismiss on the pleadings. For the reasons discussed below, we agree with Sheppard only as to one of his First Amendment claims. Accordingly, we affirm, in part, and vacate and remand, in part.

BACKGROUND

Sheppard served as a law clerk to Beerman from 1986 until he was fired on December 11, 1990. Because this case comes to us on a motion to dismiss, we must view the facts in the light most favorable to Sheppard. Accordingly, his view of the facts alleges the following series of events preceding and following his discharge.

Sheppard alleges that on December 6, 1990, after engaging in *ex parte* communications with the prosecution in a pending murder case, Beerman ordered him to draft a decision denying the defendant's pending speedy trial motion without a hearing, regardless of the motion's merits, so that the defendant would stand trial at a time advantageous to the prosecution. Sheppard refused to follow Beerman's direction, stating that he would not take part in the "railroading" of the defendant. Beerman responded that although Sheppard was not being discharged, he should seek other employment if he felt that way.

At this time, Sheppard informed Beerman that he had taken extensive notes of instances of other judicial misconduct by Beerman during the preceding four years of Sheppard's service in chambers. As an example, Sheppard noted a case that Beerman had assigned to himself in order to take personal revenge against the accused. Beerman expressed concern about Sheppard making his notes public. Harsh

words were exchanged between the parties: Sheppard called Beerman "corrupt" and a "son of a bitch," and Beerman called Sheppard "disturbed" and "disloyal." Sheppard immediately apologized for his characterization. The argument ended with no resolution, and Sheppard worked the remainder of the day.

When Sheppard next returned to work on December 11, 1990, he was removed from chambers by court officers, who informed him that Beerman had fired him. Sheppard was forced to leave immediately and not allowed to take his belongings with him. Both before and after his discharge on that day, Sheppard's property was searched by Beerman or by others at his direction. Specifically, Sheppard's file cabinets and desk drawers were searched, and a box of his personal file cards was seized and removed to Beerman's private office and examined. On December 13, 1990, Sheppard was permitted to return to chambers accompanied by court officers to retrieve certain of his belongings. On December 21, 1990, he was permitted to retrieve the rest of his personal files.

Following his discharge, Sheppard returned to Beerman's courtroom on a number of occasions. On January 18, 1991, while attending Beerman's calendar call, Sheppard began ruffling through court files. Beerman subsequently directed him to leave the courtroom if he wished to examine documents. On January 28, 1991, Beerman told an attorney not to speak with Sheppard and warned Sheppard not to involve himself in the cases Sheppard had worked on when he was a clerk. On February 11, 1991, Sheppard was told not to keep coming in and out of the courtroom, and was told to be quiet when he sought to reply to this direction.

Sheppard's Lawsuit

In April 1991, Sheppard commenced an action under 42 U.S.C. § 1983, alleging that the above actions by Beerman violated Sheppard's First Amendment right to free speech,

his First Amendment right of access to criminal proceedings and documents, his First Amendment right to petition the government for redress of grievances, and his Fourth Amendment right to be free from unlawful searches and seizures. Sheppard also asserted pendent state law tort claims for, among other things, false imprisonment, trespass, conversion, and defamation. Beerman filed an answer and then moved for judgment on the pleadings pursuant to Rule 12(c) on the grounds that Sheppard had not met threshold pleading requirements, that the complaint failed to state a cause of action, and that Beerman was entitled to qualified immunity.

On May 21, 1993, the United States District Court for the Eastern District of New York (Glasser, *J.*) granted Beerman's motion for judgment on the pleadings on the grounds that Sheppard could not state any cognizable constitutional claim under any set of facts as a matter of law. Having held that plaintiff failed to state any cognizable constitutional claims, the court declined to exercise its pendent jurisdiction over plaintiff's state law claims.

Sheppard now appeals.

DISCUSSION

We review the district court's grant of Beerman's motion to dismiss Sheppard's claims *de novo*. *See Grimes v. Ohio Edison Co.*, 992 F.2d 455, 456 (2d Cir.), *cert. denied*, 114 S. Ct. 467 (1993). In deciding a Rule 12(c) motion, we apply the same standard as that applicable to a motion under Rule 12(b)(6). *See Ad-Hoc Comm. of Baruch Black and Hispanic Alumni Ass'n v. Bernard M. Baruch College*, 835 F.2d 980, 982 (2d Cir. 1987). Under that test, a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting *Conley*

v. Gibson, 355 U.S. 41, 45-46 (1957)). This standard is "applied with particular strictness when the plaintiff complains of a civil rights violation." *Branum v. Clark,* 927 F.2d 698, 705 (2d Cir. 1991) (citations omitted).

On appeal, Sheppard generally contends that the district court erred in finding that he had not stated cognizable constitutional claims. Each of Sheppard's First and Fourth Amendment claims will be discussed in turn.

I. *First Amendment Claims*

a. *Free speech claims*

Sheppard first contends that the district court made improper factual findings in dismissing his claim that his discharge amounted to a violation of his First Amendment right to free speech. We agree, and for the reasons discussed below vacate the district court's dismissal of that claim and remand for proceedings not inconsistent with this opinion.

A state may not discharge an employee for reasons which infringe on that employee's constitutionally protected interest in freedom of speech. *See Perry v. Sindermann,* 408 U.S. 593, 597 (1972). If an employee is discharged for making statements concerning a matter of public concern, the employee's freedom of speech may have been violated. *See Rankin v. McPherson,* 483 U.S. 378, 384 (1987); *Connick v. Myers,* 461 U.S. 138, 146 (1983). In such a situation, the Court must balance the employee's interest in making the statement against "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Rankin,* 483 U.S. at 388 (quoting *Pickering v. Board of Educ.,* 391 U.S. 563, 568 (1968)).

Sheppard specifically alleges that he was dismissed in retaliation for his exercise of free speech in confronting Beerman about the judge's alleged misconduct. In order for Sheppard's claim to withstand a motion to dismiss on the pleadings, he must establish that his speech concerned a

matter of public concern, and that the speech was a motivating factor in his discharge. *See Frank v. Relin,* 1 F.3d 1317, 1330 (2d. Cir.), *cert. denied,* 114 S. Ct. 604 (1993). Speech will be fairly characterized as a matter of public concern if the speech "relat[es] to any matter of political, social, or other concern to the community." *Connick,* 461 U.S. at 146. Whether speech involves a public concern is a question of law to be determined on the basis of the "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48 & n. 7.

In analyzing the validity of Sheppard's claim, the district court made a determination that Sheppard was actually discharged for insubordination and not for his speech. We find this determination problematic for two reasons. First, the motive behind Sheppard's firing in his retaliation claim is clearly a question of fact. *See Frank v. Relin,* 1 F.3d at 1328-29. Because this question is in dispute, it was improper for the district court to answer it on a motion for dismissal on the pleadings. Second, the district court's determination that Sheppard was actually dismissed for insubordination seemed to impact its determination that Sheppard's speech was not a matter of public concern. Because the reason for Sheppard's dismissal is not relevant to the legal determination of whether his speech was a matter of public concern, we find fault with the district court's public concern analysis. Accordingly, we reverse the district court's dismissal of Sheppard's First Amendment free speech claim and remand for proceedings not inconsistent with this opinion.

b. *Remaining First Amendment claims*

Sheppard next contends that the district court erred in dismissing his claims concerning a violation of his First Amendment right of access to criminal cases, and his First Amendment right to petition the government for redress of grievances. As to these contentions we disagree. Even assuming that all the facts alleged by Sheppard in his

complaint are true, we find, as did the district court, that the facts do not support either of those claims.

Sheppard claims that Beerman violated his right to access to criminal proceedings by (i) directing Sheppard to examine court files outside of the courtroom; (ii) telling certain attorneys that it would be improper for them to speak to Sheppard about anything that Sheppard had learned during his tenure as Beerman's law clerk; (iii) refusing to field courtroom questions by those who were not parties to cases on the calendar; and (iv) admonishing Beerman to stop using the courtroom as a "revolving door" when Sheppard went in and out of Beerman's courtroom during a calendar call. Even assuming that all of the above incidents occurred, they do not indicate that Sheppard was denied a right of access to criminal proceedings. Sheppard admits that he was allowed to examine files outside of Beerman's courtroom, and that he was also permitted to listen to cases as long as he did not disrupt Beerman's courtroom proceedings or waste the court's time. Clearly, Beerman was entitled to exercise his discretion in keeping decorum in his courtroom.

Sheppard's claim that he was deprived of his right to petition for redress of grievances is equally without merit. The instant action provides such a vehicle. Accordingly, we affirm the district court's dismissal of these claims.

II. *Fourth Amendment Claims*

A. *Search/Seizure of Office, Desk, and File Cabinets*

Sheppard alleges that after the dismissal, Beerman searched his office, desk, and file cabinets in violation of his Fourth Amendment rights. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen,* 466 U.S. 109, 113 (1984). *See also O'Connor v. Ortega,* 480 U.S. 709, 715 (1987). The district court ultimately concluded that Sheppard had no reasonable expectation of privacy in his

office furniture or file cabinets, and therefore any search was not violative of Sheppard's Fourth Amendment rights. For the reasons discussed below, we agree.

An "employee's expectation of privacy must be assessed in the context of the employment relation[ship]." *Ortega,* 480 U.S. at 717. The working relationship between a judge and her law clerk, as noted by the district court, is unique. Unlike a typical employment relationship where an employer may limit the information she wants to share with her employees, in order for a judicial chambers to function efficiently, an absolute free flow of information between the clerk and the judge is usually necessary. Accordingly, the clerk has access to all the documents pertaining to a case. More importantly, clerks regularly have access to the judge's confidential thoughts on a case. The judge may discuss her feelings with her clerk, or may allow the clerk access to her personal notes. In turn, the judge necessarily has access to the files and papers kept by the clerk, which will often include the clerk's notes from discussions with the judge. Because of this distinctive open access to documents characteristic of judicial chambers, we agree with the district court's determination that Sheppard had "no reasonable expectation of privacy in chambers' appurtenances, embracing desks, file cabinets or other work areas." Accordingly, the district court was correct in finding that there was no violation of Sheppard's Fourth Amendment rights.

Moreover, we also agree with the district court's finding that any alleged seizure done in connection with the search was similarly not violative of Sheppard's Fourth Amendment rights. Even assuming that Sheppard's belongings were seized for a short time during the judge's search of his things, a short delay by a judicial employer in returning a disgruntled employee's belongings after the employee has been fired does not rise to the level of a Fourth Amendment violation. The unlawfulness of an interference with an individual's possessory interest in property depends on the reasonableness of the seizure. *See Soldal v. Cook County,* 113

S. Ct. 538, 549 (1992). Because a judicial employer has an overriding interest in securing the confidentiality of chambers' work product and in making sure that an angry clerk does not attempt to confiscate or destroy important court property, the brief alleged withholding of Sheppard's belongings while they were searched was not unreasonable.

B. *Seizure of Sheppard's Person*

Sheppard's final claim is that there was an unlawful seizure of his person when he was escorted out of the courthouse by court officers on December 11, 1990. The district court dismissed this claim finding that Sheppard's liberty was never restrained. We agree.

In order to determine whether a particular encounter between police officers and an individual constitutes a "seizure" for the purposes of the Fourth Amendment, a court must decide "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall,* 446 U.S. 544, 554 (1980).

In the present case, as correctly noted by the district court, Sheppard was "free to go anywhere else that he desired," with the exception of Beerman's chambers and the court house. Had Beerman retained Sheppard's car keys or his wallet, then perhaps Sheppard arguably could have been seized, because it would have prevented him from being "free to leave." *See, e.g., United States v. Lee,* 916 F.2d 814, 819 (2d Cir. 1990) (noting factors that might suggest a seizure include "prolonged retention of a person's personal effects, such as airplane tickets or identification."). Because there are no such allegations in Sheppard's complaint, Sheppard has failed to state a claim that his person was seized.

We have examined Sheppard's remaining contentions and find them to be without merit.

SHEPPARD I

CONCLUSION

Based on the foregoing, we affirm the district court's dismissal of all of Sheppard's claims other than his First Amendment free speech claim. Regarding that claim, we find that in concluding that Sheppard failed to state a violation of his First Amendment right to free speech, the district court made certain factual determinations that were not appropriate on a motion for judgment on the pleadings. Accordingly, we vacate the district court's dismissal of Sheppard's First Amendment freedom of speech claim on the pleadings and remand for proceedings not inconsistent with this opinion. In doing so, however, we make no comment on the merits of the claim nor do we preclude the district court from re-examining the matter at some future, more appropriate time in the proceedings. Our ruling today is based only on the procedural posture in which the case came before the district court.

SECOND CIRCUIT'S 1996 DECISION (*SHEPPARD II*)

United States Court of Appeals,
Second Circuit.

Brian SHEPPARD, Plaintiff-Appellant,
v.
Leon BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York, Defendant-Appellee.

No. 1791, Docket 96-7112.

Argued June 19, 1996.
Decided Sept. 6, 1996.

Brian Sheppard, *pro se*, for *Plaintiff-Appellant.*

Amy L. Abramowitz, Asst. Atty. Gen. of N.Y., New York City (Dennis C. Vacco, Atty. Gen. of N.Y., New York City, of counsel), for *Defendant-Appellee.*

Michael Colodner, John Eiseman, John J. Sullivan, New York City, submitted a brief, for *amicus curiae* Jonathan Lippman, Chief Administrative Judge of the Courts of the State of New York.

Before: KEARSE, MAHONEY, and McLAUGHLIN, *Circuit Judges.*

McLAUGHLIN, *Circuit Judge.*

Plaintiff Brian Sheppard appeals from a Memorandum and Order of the United States District Court for the Eastern District of New York (I. Leo Glasser, *Judge*), *see Sheppard v. Beerman,* 911 F. Supp. 606 (E.D.N.Y. 1995), granting defendant Judge Leon Beerman's motion to dismiss Sheppard's complaint on the grounds of qualified immunity. For the reasons stated below, we vacate the district court's order

and remand for further proceedings consistent with this opinion.

BACKGROUND

This case is before us for the second time. *See Sheppard v. Beerman,* 18 F.3d 147 (2d Cir. 1994). In our first opinion, we set forth the essential facts, none of which have changed:

> [Brian] Sheppard served as a law clerk to [New York State Supreme Court Justice Leon] Beerman from 1986 until he was fired on December 11, 1990.
>
> . . .
>
> Sheppard alleges that on December 6, 1990, after engaging in ex parte communications with the prosecution in a pending murder case, Beerman ordered him to draft a decision denying the defendant's pending speedy trial motion without a hearing, regardless of the motion's merits, so that the defendant would stand trial at a time advantageous to the prosecution. Sheppard refused to follow Beerman's direction, stating that he would not take part in the "railroading" of the defendant. Beerman responded that although Sheppard was not being discharged, he should seek other employment if he felt that way.
>
> At this time, Sheppard informed Beerman that he had taken extensive notes of instances of other judicial misconduct by Beerman during the preceding four years of Sheppard's service in chambers. As an example, Sheppard noted a case that Beerman had assigned to himself in order to take personal revenge against the accused. Beerman expressed concern about Sheppard making his notes public. Harsh words were exchanged between the parties: Sheppard called Beerman "corrupt" and a "son of a bitch," and Beerman called Sheppard "disturbed" and "disloyal." Sheppard immediately apologized for his characterization. The argument ended with no resolution, and Sheppard worked the remainder of the day.

SHEPPARD II

When Sheppard next returned to work on December 11, 1990, he was removed from chambers by court officers, who informed him that Beerman had fired him. Sheppard was forced to leave immediately and not allowed to take his belongings with him. Both before and after his discharge on that day, Sheppard's property was searched by Beerman or by others at his direction. Specifically, Sheppard's file cabinets and desk drawers were searched, and a box of his personal file cards was seized and removed to Beerman's private office and examined. On December 13, 1990, Sheppard was permitted to return to chambers accompanied by court officers to retrieve certain of his belongings. On December 21, 1990, he was permitted to retrieve the rest of his personal files.

Following his discharge, Sheppard returned to Beerman's courtroom on a number of occasions. On January 18, 1991, while attending Beerman's calendar call, Sheppard began ruffling through court files. Beerman subsequently directed him to leave the courtroom if he wished to examine documents. On January 28, 1991, Beerman told an attorney not to speak with Sheppard and warned Sheppard not to involve himself in the cases Sheppard had worked on when he was a clerk. On February 11, 1991, Sheppard was told not to keep coming in and out of the courtroom, and was told to be quiet when he sought to reply to this direction.

Id. at 149-50.

Sheppard sued Beerman in the United States District Court for the Eastern District of New York, under 42 U.S.C. § 1983, alleging that Beerman's actions:

> violated Sheppard's First Amendment right to free speech, his First Amendment right of access to criminal proceedings and documents, his First Amendment right to petition the government for redress of grievances, and his

> Fourth Amendment right to be free from unlawful searches and seizures. Sheppard also asserted pendent state law tort claims for, among other things, false imprisonment, trespass, conversion, and defamation.

Sheppard, 18 F.3d at 150. Beerman answered, and then moved for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c) ("Rule 12(c)"), on the grounds that Sheppard had failed to state a cause of action, and that Beerman was in any event entitled to qualified immunity.

The district court granted Beerman's motion for judgment on the pleadings, finding that, as a matter of law, Sheppard could not state a constitutional claim. *See Sheppard v. Beerman,* 822 F. Supp. 931 (E.D.N.Y. 1993). The district court also declined to exercise jurisdiction over plaintiff's pendent state law claims. Sheppard appealed to this Court; we affirmed most of the district court's rulings, but vacated the dismissal of Sheppard's First Amendment free speech claim. *See Sheppard,* 18 F.3d at 151, 153. Specifically, we stated:

> In analyzing the validity of Sheppard's claim, the district court made a determination that Sheppard was actually discharged for insubordination and not for his speech. . . . Because this question is in dispute, it was improper for the district court to answer it on a motion for dismissal on the pleadings.
>
> . . .
>
> Based on the foregoing . . . we find that in concluding that Sheppard failed to state a violation of his First Amendment right to free speech, the district court made certain factual determinations that were not appropriate on a motion for judgment on the pleadings. . . . [W]e make no comment on the merits of the claim nor do we preclude the district court from re-examining the matter at some future, more appropriate time in the proceedings.

Id.

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On remand, the district court again granted judgment to Beerman on the pleadings. *See Sheppard,* 911 F. Supp. 606. Finding, as a matter of law, that Sheppard's speech was on a matter of public concern and that Sheppard had shown a *prima facie* case of unconstitutional discharge, the district court found nevertheless that Beerman was entitled to qualified immunity. It concluded that Beerman "acted within the realm of objective reasonableness in terminating Sheppard's employment," and thus was entitled to judgment on the pleadings. *Id.* at 616.

The court also held that, because Beerman's qualified immunity deprived Sheppard of an actionable claim, his request for declaratory relief had no foundation, and also had to be dismissed. It further found that Sheppard had not shown a sufficient likelihood of future harm to warrant his requested injunctive relief. With that, the district court again dismissed Sheppard's claim in its entirety. Sheppard now appeals, arguing that the district court erred in its pivotal finding that Beerman was entitled to qualified immunity.

DISCUSSION

We review the district court's Rule 12(c) dismissal of Sheppard's complaint *de novo. See Sheppard,* 18 F.3d at 150; *Ad-Hoc Comm. of the Baruch Black and Hispanic Alumni Ass'n v. Bernard M. Baruch College,* 835 F.2d 980, 982 (2d Cir. 1987). All allegations in the complaint must be accepted as true; all inferences must be drawn in favor of the plaintiff; and dismissal is proper only when it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sheppard,* 18 F.3d at 150 (internal quotations and citation omitted). When there has been a dismissal on the grounds of qualified immunity, whether there are disputed issues of fact that should have prevented the dismissal is also subject to our *de novo* review. *See Weaver v. Brenner,* 40 F.3d 527, 533 (2d Cir. 1994); *Cartier v. Lussier,* 955 F.2d 841, 844 (2d Cir. 1992); *see also*

Tompkins v. Vickers, 26 F.3d 603, 606 (5th Cir. 1994).

Government employees have a limited right under the First Amendment to speak on matters of public concern. *See Connick v. Myers,* 461 U.S. 138, 146 (1983); *Frank v. Relin,* 1 F.3d 1317, 1328 (2d Cir.), *cert. denied,* 510 U.S. 1012 (1993). To plead a *prima facie* case that he was fired in violation of his First Amendment rights, a plaintiff must establish that: (1) his speech can be "fairly characterized as . . . speech on a matter of public concern;" and (2) the speech was "at least a substantial or motivating factor in the discharge." *Frank,* 1 F.3d at 1328 (internal quotations and citations omitted).

It is clear, though, that a government official may, in certain circumstances, fire an employee for speaking--even on a matter of public concern--where that speech has the potential to disrupt the work environment. *See Rankin v. McPherson,* 483 U.S. 378, 384 (1987). In *Jeffries v. Harleston,* 52 F.3d 9 (2d Cir.), *cert. denied,* 116 S. Ct. 173 (1995), we stated that termination does not violate the employee's First Amendment rights where:

> (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.

Id. at 13; *see also Waters v. Churchill,* 511 U.S. 661, ___, 114 S. Ct. 1878, 1889-91 (1994); *see generally Board of County Comm'rs v. Umbehr,* ___ U.S. ___, 116 S. Ct. 2342, 2347-48, 2352 (1996). Thus, even if the potential disruption to the office outweighs the value of the speech, the employer may fire the employee only *because of* the potential disruption, and *not because of* the speech. That is to say, it matters not that the potential disruption outweighs the value of the speech if the employer subjectively makes the speech the basis of his termination decision: such "retaliatory" discharge is always unconstitutional.

SHEPPARD II

As with any "constitutional tort," a governmental employer (such as a state court judge) may be entitled to qualified immunity for firing an employee in apparent breach of the First Amendment. *See Tompkins,* 26 F.3d at 607; *Frank,* 1 F.3d at 1327-28. If the employer's firing of the employee actually violates the employee's First Amendment rights, the employer will nonetheless be qualifiedly immune from suit if an objective, reasonable officer could believe that the firing did *not* violate the employee's rights. *See Anderson v. Creighton,* 483 U.S. 635, 638 (1987); *Frank,* 1 F.3d at 1327-28.

This case presents the risk of conflating a constitutional test that focuses, at least in part, on the *subjective* state of mind of the actor--the employer's actual motive for firing the employee--with the *objective* focus of the qualified immunity doctrine. Obviously, applying an objective test to a subjective element is a contradiction in terms: it would compel an inquiry as to whether a person reasonably could have thought that he in fact thought something.

The district court reasoned that, in a mixed case of this sort, the subjective prong of the constitutional test simply drops out--that Beerman's actual motive in firing Sheppard is "irrelevant." *Sheppard,* 911 F. Supp. at 616. Thus, the court held that: (1) an objective judge could have reasonably thought that the potential disruption caused by Sheppard's speech outweighed the value of that speech; (2) Beerman's actual motive in firing Sheppard was inconsequential; and (3) Beerman was therefore qualifiedly immune from suit.

Sheppard asserts that qualified immunity is not available where he has alleged that Beerman had an actual unconstitutional motive in firing him. To a limited extent, we agree.

Contrary to the district court's decision, the employer's actual (subjective) motive is *not* irrelevant in a qualified immunity inquiry. Rather, where the subjective state of mind of the actor is part of the constitutional mix, we have developed a rule that balances the interests of the official claiming immunity against the interests of the employee asserting unconstitutional motive:

SHEPPARD II

> Upon a motion for summary judgment asserting a qualified immunity defense in an action in which an official's conduct is objectively reasonable but an unconstitutional subjective intent is alleged, the plaintiff must proffer particularized evidence of direct or circumstantial facts . . . supporting the claim of an improper motive in order to avoid summary judgment.

Blue v. Koren, 72 F.3d 1075, 1084 (2d Cir. 1995). This standard allows an allegedly offending official sufficient protection against baseless and unsubstantiated claims, but stops short of insulating an official whose objectively reasonable acts are besmirched by a prohibited unconstitutional motive. *See Tompkins,* 26 F.3d at 607-08.

Thus, to defeat Beerman's claim of qualified immunity, Sheppard must show "particularized evidence of direct or circumstantial facts" supporting his claim of unconstitutional motive. And, the district court would obviously have to consider matters outside the pleadings. Rule 12(c) provides that a motion for judgment on the pleadings may be converted to a motion for summary judgment (under Fed. R. Civ. P. 56) if the court chooses to consider evidence extrinsic to the complaint and answer. *See* Fed. R. Civ. P. 12(c). However, Rule 12(c) also commands that, when so converting the motion to one for summary judgment, each party "shall be given a reasonable opportunity to present all material" pertinent to a summary judgment determination. *Id.; see also Villante v. Department of Corrections of New York,* 786 F.2d 516, 521 (2d Cir. 1986).

The problem here is that the district court dismissed Sheppard's complaint without allowing Sheppard any discovery. According to Sheppard's complaint, Beerman expressed deep concern over Sheppard's claim to have kept notes detailing Beerman's instances of public corruption, and the possibility that those notes would be made public. And, after firing Sheppard, Beerman seized Sheppard's personal files, and inspected them before returning them to Sheppard.

If substantiated through discovery, these facts may tend to show that Beerman's actual motive for firing Sheppard was the content of his speech, and not Beerman's fear that Sheppard would disrupt the office working environment.

The district court therefore erred in finding that Beerman's actual intent was "irrelevant," and in not allowing Sheppard discovery to support his claim of unconstitutional motive. If, after sufficient discovery, Sheppard cannot present particularized (direct or circumstantial) evidence of unconstitutional motive, Beerman is then, but only then, entitled to summary judgment on the grounds of qualified immunity.

Sheppard argues that the district court also improperly dismissed his claims for injunctive and declaratory relief. The court dismissed Sheppard's claim for declaratory relief because, having found that Beerman was immune from damages, there was no case or controversy remaining upon which Sheppard could base a request for declaratory relief. Because we vacate the district court's dismissal of Sheppard's claim for monetary damages, the foundation for dismissing the declaratory relief claim erodes. *See generally Ashcroft v. Mattis,* 431 U.S. 171, 172 (1977). We therefore reinstate Sheppard's claim for declaratory relief, subject to the discussion above concerning his claim for monetary damages.

The district court dismissed Sheppard's claim for injunctive relief because Sheppard had "failed to show an 'actual or imminent' threat of injury to a legally protected right." *Sheppard,* 911 F. Supp. at 617. Even assuming Sheppard can succeed on his legal claim for unconstitutional termination, this "past" injury, "while presumably affording [Sheppard] standing to claim damages . . . , does nothing to establish a real and immediate threat that he would again suffer similar injury in the future." *Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097, 2104 (1995) (citations omitted).

In his complaint, Sheppard alleges that Beerman "embarked on a course of conduct . . . designed to . . . punish [Sheppard] for his objecting to, or considering to expose,"

Beerman's alleged judicial misconduct, and to prevent Sheppard from disclosing that misconduct. Specifically, Sheppard alleges that Beerman seized Sheppard's files, gratuitously told others that Sheppard was insubordinate and was fired for that insubordination, and asked (or even instructed) others not to talk with Sheppard. The complaint also states that these statements, designed to impede Sheppard's First Amendment rights, have continued since Sheppard's termination, and that Beerman intends to take further steps in the future.

These facts, if substantiated, may be sufficient to show that Sheppard faces a credible threat of future actions designed to stifle his First Amendment rights. Because we are vacating and remanding for discovery on Sheppard's claim for monetary damages and declaratory relief, we also vacate and remand the dismissal of his claim for injunctive relief to allow Sheppard through discovery to substantiate his claims of future harm. If after discovery, however, Sheppard cannot produce sufficient facts to support his claimed threat of future harm, the district court may properly dismiss the claim for injunctive relief at an appropriate time.

Finally, Sheppard asks us to remand this case to a different district court judge, claiming that Judge Glasser has shown distinct signs of "bias" against Sheppard's claims. We find Sheppard's arguments and assertions insufficient to meet the high standard for such relief. *See In re International Business Machines Corp.*, 45 F.3d 641, 643-45 (2d Cir. 1995).

CONCLUSION

An *amicus* brief, submitted on behalf of the Chief Administrative Judge of the Courts of the State of New York, reminds us of what we well know--that the relationship between a judge and clerk is one based upon trust and faith. If a judge cannot believe that his clerk is competent, loyal, and discrete, the working relationship between the two is not just injured, it is nonexistent. We also recognize that

Sheppard's choice of language was inappropriate for a professional setting. But the First Amendment protects the eloquent and insolent alike.

The judgment of the district court is VACATED, and the case is REMANDED to the district court for proceedings consistent with this opinion.

SECOND CIRCUIT'S 2003 DECISION (*SHEPPARD III*)

United States Court of Appeals,
Second Circuit.

Brian SHEPPARD, Plaintiff-Appellant,
v.
Leon BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York, Defendant-Appellee.

Docket No. 02-7292.

Argued: Oct. 23, 2002.
Decided: Jan. 28, 2003.

Brian Sheppard, Law Office of Brian Sheppard, New Hyde Park, NY, *pro se*, for *Plaintiff-Appellant*.

Michael B. Siller, for Eliot Spitzer, Att'y Gen. of N.Y., New York, N.Y. (Michael S. Belohlavek, Deputy Solicitor Gen. of N.Y., New York, NY, of counsel) for *Defendant-Appellee*.

Before: WINTER, McLAUGHLIN and CABRANES, *Circuit Judges*.

McLAUGHLIN, *Circuit Judge*.

Former law clerk Brian Sheppard appeals from the district court's grant of summary judgment to his former employer, Judge Leon Beerman. In an earlier opinion in this case, we noted that the First Amendment protects the eloquent and the insolent alike. Plaintiff has now conducted ample discovery, but has failed to create a genuine issue of material fact as to Judge Beerman's intent in terminating him. We hold, therefore, that the district court correctly granted summary judgment.

SHEPPARD III

BACKGROUND

This case is before us for the third time. *Sheppard v. Beerman,* 18 F.3d 147 (2d Cir. 1994) ("Sheppard I"); *Sheppard v. Beerman,* 94 F.3d 823 (2d Cir. 1996) ("Sheppard II").

I. *Factual Background*

The core facts have been reported in the two earlier opinions. Extensive discovery has supplemented those facts, *see Sheppard v. Beerman,* 190 F. Supp. 2d 361 (E.D.N.Y. 2002), and we need only summarize here. Brian Sheppard served as a law clerk to New York State Supreme Court Justice Leon Beerman from 1986 until he was fired on December 11, 1990.

A week earlier, on December 6, 1990, Sheppard and Judge Beerman had conferred on the Judge's contemplated action on a speedy trial motion in *People v. Mason & Williams,* a pending murder case. Judge Beerman asked Sheppard to draft a decision that would set the case for trial after the coming Christmas holiday season. Sheppard, however, believed that such a disposition would be unfairly prejudicial to Williams and not based on the merits. Sheppard felt that Judge Beerman, under pressure from the prosecution, was railroading Williams. Sheppard stated at his deposition that the prosecutor was upset about the lenient sentence Williams previously had received in a related drug case, and the negative publicity generated thereby. Sheppard also believed that Judge Beerman had unfairly accommodated the prosecution's request to delay the trial until January on the notion that a trial during the holiday season would be less likely to result in a conviction.

On the morning of December 7, 1990, Sheppard came to chambers and declared that he would not work on the speedy trial motion in the Williams case because of his belief that the defendant was being "railroaded." Beerman responded that, although Sheppard was not being discharged, if he felt that way he should seek other employment.

SHEPPARD III

In response, Sheppard called Judge Beerman a "corrupt son of a bitch," but he quickly apologized for the characterization. Sheppard then informed Beerman that he had preserved extensive notes of other judicial misconduct by Beerman during the preceding four years. When asked by Judge Beerman to provide examples, Sheppard noted a case that Beerman had allegedly assigned to himself in order to exact revenge against the accused. He told Judge Beerman that he would go public with the notes if he was forced to resign. Then Judge Beerman called Sheppard "disturbed" and "disloyal." After the confrontation, Sheppard offered to go home but Judge Beerman instructed him to work the rest of the day, which he did.

Judge Beerman testified during his deposition that he conferred with his son, an attorney, that evening, and decided that he and Sheppard should part ways. Judge Beerman also testified that he had resolved to speak with Administrative Judge Alfred Lerner about the incident when he returned to the courthouse on the following Monday, December 10, 1990.

Sheppard did not show up for work that Monday. On Tuesday, December 11, Judge Beerman met with Judge Lerner about the incident. Judge Lerner was astonished by Sheppard's behavior and confirmed Judge Beerman's view that Sheppard could no longer remain in either Judge Beerman's employ, or indeed, in the employ of the court system.

When Sheppard arrived at work on December 11, four days after the confrontation, court officers informed him that Judge Beerman had fired him. Sheppard was forced to leave immediately and was not allowed to take his belongings with him. Several days later, Sheppard was permitted to return to chambers, accompanied by court officers, to retrieve his personal belongings.

SHEPPARD III

II. *Procedural History*

In April 1991, Sheppard sued Beerman in the United States District Court for the Eastern District of New York (Glasser, *J.*), under 42 U.S.C. § 1983. The complaint alleged, *inter alia,* that Beerman's discharge of Sheppard and his subsequent conduct violated Sheppard's First and Fourteenth Amendment rights.

The district court granted Beerman's motion for judgment on the pleadings, finding that, as a matter of law, Sheppard could not state a § 1983 claim. *Sheppard v. Beerman,* 822 F. Supp. 931 (E.D.N.Y. 1993). Sheppard appealed to this Court. We affirmed most of the district court's rulings, but salvaged just Sheppard's First Amendment free speech claim because the district court had made an improper factual determination--at the pleadings stage--"that Sheppard was actually discharged for insubordination and not for his speech." *Sheppard I,* 18 F.3d at 151, 153.

On remand, the district court again granted judgment to Beerman on the pleadings. *Sheppard,* 911 F. Supp. 606 (E.D.N.Y. 1995). Finding, as a matter of law, that Sheppard's speech touched on a matter of public concern and that he had shown a *prima facie* case of unconstitutional discharge, the district court nevertheless held that Beerman was entitled to qualified immunity. The court concluded that Beerman "acted within the realm of objective reasonableness in terminating Sheppard's employment," and thus was entitled to judgment on the pleadings. *Id.* at 616.

Sheppard again appealed to this Court, arguing that the district court erred in finding that Beerman was entitled to qualified immunity. We agreed, holding that the district court had erred in finding that Judge Beerman's actual intent in terminating Sheppard was "irrelevant" and in not allowing Sheppard discovery to support his claim of unconstitutional motive. *Sheppard II,* 94 F.3d at 829. We stated that Beerman would be entitled to summary judgment, "[i]f, after sufficient discovery, Sheppard cannot present particularized (direct or

circumstantial) evidence of unconstitutional motive." *Id.*

On remand, Sheppard conducted exhaustive discovery, deposing over thirty witnesses, including Judge Beerman. In addition, Sheppard himself was deposed over the course of three days. In January 2001, Judge Beerman eventually moved for summary judgment.

In February 2002, the district court granted Beerman summary judgment, holding that Sheppard had failed to establish that his interest in commenting on a matter of public concern (Judge Beerman's alleged corruption) outweighed Judge Beerman's interest in the smooth, efficient operation of his chambers. *See Sheppard v. Beerman,* 190 F. Supp. 2d at 381-82 (citing *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968)). The district court further stated that "no reasonable juror could infer from the facts alleged by Sheppard that the termination resulted from an unlawful desire to curb speech on a matter of public concern rather than a legitimate desire by Judge Beerman to maintain the efficiency, discipline and harmony of his public office." *Id.* at 384.

Sheppard now appeals again. For the reasons set forth below, we affirm the decision of the district court.

DISCUSSION

We review a grant of summary judgment *de novo,* examining the evidence in the light most favorable to, and drawing all inferences in favor of, the non-movant. *See, e.g., IBM Corp. v. Liberty Mut. Fire Ins. Co.,* 303 F.3d 419, 423 (2d Cir. 2002). Summary judgment is appropriate only if it can be established "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Government employees have a limited right under the First Amendment to speak on matters of public concern. *Connick v. Myers,* 461 U.S. 138, 140 (1983); *Frank v. Relin,* 1 F.3d 1317, 1328 (2d Cir. 1993). In measuring the extent of

this right, the interests that must be carefully balanced are the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S. at 568.

To make out a *prima facie* case that he was fired in violation of his First Amendment rights, a government employee must show that: (1) his speech can be "fairly characterized as constituting speech on a matter of public concern," and (2) the speech was "at least a 'substantial' or 'motivating' factor in the discharge." *Frank,* 1 F.3d at 1328.

A government official may nonetheless fire an employee for speaking on a matter of public concern if the employee's speech is reasonably likely to disrupt the effective functioning of the office, and the employee is fired to prevent this disruption. *Jeffries v. Harleston,* 52 F.3d 9, 12-13 (2d Cir. 1995); *see also Rankin v. McPherson,* 483 U.S. 378, 388 (1987). Thus, termination does not violate the employee's rights where: "(1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech." *Sheppard II,* 94 F.3d at 827 (quoting *Jeffries,* 52 F.3d at 13).

1. *Prediction of Disruption*

Doubtless, Judge Beerman's prediction of disruption caused by Sheppard's outburst was reasonable. We stated in *Sheppard II* that "[i]f a judge cannot believe that his clerk is competent, loyal, and discreet, the working relationship between the two is not just injured, it is nonexistent." 94 F.3d at 829. Indeed, in their role as employees, law clerks amount to "extensions of the judges at whose pleasure they serve." *Oliva v. Heller,* 839 F.2d 37, 40 (2d Cir. 1988) (quoting *Oliva v. Heller,* 670 F. Supp. 523, 526 (S.D.N.Y. 1987)). Thus, at the

very minimum, a respectful, if not congenial, relationship between clerk and judge is a prerequisite to a productive work environment within a judge's chambers.

During the incident in question, it is undisputed that Sheppard yelled at Judge Beerman and called him an obscene epithet. Sheppard's outburst was grossly disrespectful and an expression of personal contempt for Judge Beerman. Given the nature of the judge-clerk relationship, we conclude that Judge Beerman's prediction that Sheppard's outburst would disrupt the efficient operation of chambers was eminently reasonable.

2. *Disruption and Value of the Speech*

For similar reasons, we find that the potential disruptiveness to Judge Beerman's chambers outweighed whatever value there was in Sheppard's speech. The vitriolic manner in which Sheppard expressed himself, regardless of the substance of his remarks, made a harmonious working relationship between Sheppard and Beerman difficult to imagine. Sheppard's use of the word "corrupt" and his several references to Beerman's alleged misconduct during his invective are not of sufficient import to outweigh the potential disruption his outburst caused.

Where an employee, such as Sheppard, "holds an extremely confidential or highly placed advisory position, it would be unlikely [for] the *Pickering* balance . . . to be struck in his favor." *McEvoy v. Spencer,* 124 F.3d 92, 103 (2d Cir. 1997). Sheppard was undoubtedly in such a position here, and we agree with the district court that the *Pickering* factors favor Judge Beerman.

3. *Employer's Motivation*

"[E]ven if the *Pickering* balance is resolved in the employer's favor, the employee may still demonstrate liability by proving that the employer disciplined the employee in

retaliation for the speech, rather than out of fear of the disruption." *Lewis v. Cowen,* 165 F.3d 154, 163 (2d Cir. 1999). Indeed, we remanded this case to the district court to allow Sheppard "sufficient discovery . . . [to] present particularized (direct or circumstantial) evidence of unconstitutional motive." *Sheppard II,* 94 F.3d at 829. Thus, Sheppard's claim could survive summary judgment only if he could introduce sufficient evidence to create a genuine issue of material fact with respect to Judge Beerman's intent. We agree with the district court that he has not succeeded.

Despite exhaustive discovery, Sheppard has been unable to produce an iota of evidence that Judge Beerman terminated him to prevent him from speaking about Beerman's alleged misconduct. At its core, Sheppard's argument is that he was terminated because he threatened to go forward and expose Beerman's corruption. As the district court observed, however, this contention "is *disproved,* rather than proved, by the act of termination, since that act, as described by Sheppard, was akin to an invitation to speak." *Sheppard v. Beerman,* 190 F. Supp. 2d at 377. As we have noted before, and as Judge Beerman surely understood, terminating an employee "is far more likely to cause [one] to 'go public' than to silence him or her." *Giacalone v. Abrams,* 850 F.2d 79, 88 (2d Cir. 1988).

In response, Sheppard contends that Beerman told him to "look for another job" before Sheppard actually tarred him as a "corrupt son of a bitch." However, this comment was made after Sheppard professed unhappiness with working for Judge Beerman; Beerman's suggestion that Sheppard should consider looking for another job "if that's how you feel" is unremarkable in this tableau.

Sheppard's other arguments point out minor and immaterial discrepancies in Judge Beerman's deposition testimony. Sheppard essentially suggests that Judge Beerman is lying about his motive for firing Sheppard. A plaintiff, however, "cannot defeat summary judgment on a retaliation claim merely by impugning [a defendant's] honesty." *McCullough*

v. Wyandanch Union Free Sch. Dist., 187 F.3d 272, 280 (2d Cir. 1999). Sheppard has produced no other evidence, direct or circumstantial, to support his claim despite voluminous discovery.

Given the explosive exchange between Beerman and Sheppard and Sheppard's inability to produce any evidence supporting his claim of improper motive, the district court did not err in granting summary judgment to Judge Beerman. After the December 7 confrontation, Judge Beerman did not believe that maintaining a productive, harmonious working relationship in chambers was possible. On this record, no reasonable juror could infer from the facts alleged by Sheppard that his termination resulted from an unlawful desire to curb speech on a matter of public concern rather than a legitimate desire by Beerman to maintain the efficiency and harmony of his chambers.

CONCLUSION

We have considered Sheppard's other arguments and find them to be without merit. Therefore, the judgment of the district court is hereby AFFIRMED.

1993 DIST. CT. DECISION (*SHEPPARD I* BELOW)

United States District Court,
E.D. New York.

Brian SHEPPARD, Plaintiff,
v.
Leon BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York, Defendant.

No. CV-91-1349.

May 21, 1993.

Brian Sheppard, pro se.

Lisa M. Evans, Asst. Atty. Gen., New York City, for defendant.

MEMORANDUM AND ORDER

GLASSER, District Judge:

Plaintiff Brian Sheppard commenced this civil rights action against defendant Leon Beerman, Justice of the Supreme Court of the State of New York, alleging that the defendant violated his First and Fourth Amendment rights in discharging him from employment as defendant's law clerk. Defendant moves for a judgment of dismissal on the pleadings under Fed. R. Civ. P. 12(c). In addition, plaintiff appeals various determinations of the magistrate judge relating to discovery matters, and moves this Court to vacate its prior referral order to the magistrate judge. For the following reasons, defendant's motion is granted and plaintiff's motions are denied.

SHEPPARD I BELOW

FACTS

Plaintiff served as a law clerk to defendant until he was fired on December 11, 1990. Plaintiff claims that his dismissal resulted from a heated dispute on December 7, 1990, over the ethical propriety of defendant's actions and decisions in two criminal cases. The complaint notes that harsh words were exchanged between the parties: plaintiff admits calling defendant "corrupt" and a "son of a bitch", and further asserts that he in turn was called "disturbed" and "disloyal." *Id.* ¶ 14. In addition, plaintiff alleges that he informed defendant at that time that he had written extensive notes of instances of other judicial misconduct during the preceding four years of his service in chambers. Complaint ¶¶ 8-15.

When plaintiff returned to work on December 11, 1990, he was removed from chambers by court officers, who informed him that defendant had fired him. *Id.* ¶ 22. The complaint further alleges that plaintiff was not permitted to retrieve his personal effects at that time, and that both before and after his discharge on that day, plaintiff's property was searched by defendant or by others at defendant's direction. *Id.* ¶¶ 19-20, 24. However, plaintiff concedes that he was allowed to return to chambers to retrieve his property on December 13 and 21, 1990, when accompanied by court officers, and plaintiff indicates that he is unsure whether all of his personal effects were returned. *Id.* ¶¶ 24-28.

Plaintiff also alleges that defendant made, and has continued to make, untrue and defamatory statements about him. *Id.* ¶¶ 30-33. He also asserts that on January 18, 1991, when he attended calendar call in defendant's courtroom, Justice Beerman directed him to leave the courtroom if he wished to examine court files. *Id.* ¶ 34. In addition, during a subsequent visit to the courtroom on February 11, plaintiff was allegedly told not to keep coming in and out of the room, and was told to be quiet when he sought to reply to this direction. *Id.* ¶ 37.

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Plaintiff commenced this action in April 1991 under 42 U.S.C. § 1983, alleging that defendant deprived him of his First and Fourth Amendment rights in the events surrounding and subsequent to plaintiff's dismissal. Plaintiff also asserts pendent state law tort claims for, *inter alia,* false imprisonment, trespass, conversion, and defamation. Defendant filed an answer to the complaint on May 8, 1991.

Defendant now moves for judgment on the pleadings under Fed. R. Civ. P. 12(c). Plaintiff appeals from certain pre-trial orders of the magistrate judge and requests that this Court vacate its prior referral order to the magistrate judge. These motions will be addressed in turn.

I. Rule 12(c) Motion

Normally, a motion to dismiss all or part of an action for failure to state a claim may be brought under Fed. R. Civ. P. 12(b)(6). However, because the language of Rule 12(b) limits motions under its terms to the time period before the close of the pleadings, and because Rule 12(h)(2) nevertheless permits motions to dismiss for failure to state a claim at any time up to and during the trial, Rule 12(c) may be used as a vehicle for making such a motion after the close of pleadings. *See generally* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1367 (2d ed. 1990).

In deciding a Rule 12(c) motion, the court should apply the same standard as that applicable to a motion under 12(b)(6). *Ad-Hoc Comm. of Baruch Black & Hispanic Alumni Ass'n v. Bernard M. Baruch College,* 835 F.2d 980, 982 (2d Cir. 1987). Under that test, a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)).

SHEPPARD I BELOW

As a preliminary matter, defendant challenges the complaint as being too broad and conclusory to support a § 1983 claim. A fair reading of the complaint, however, reveals that it sets forth in detail the particular events and transactions giving rise to this action, as well as the specific constitutional violations of which the plaintiff complains. An analysis of the claims follows.

1. First Amendment claims

While a state "may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech," *Rankin v. McPherson,* 483 U.S. 378, 383-84 (1987) (citing *Perry v. Sindermann,* 408 U.S. 593, 597 (1972)), it has long been recognized that "the government has a legitimate interest in regulating the speech of its employees that differs significantly from its interest in regulating the speech of [the] general [public]." *Piesco v. City of New York, Dep't of Personnel,* 933 F.2d 1149, 1155 (2d Cir.) (citing *Rankin,* 483 U.S. at 383-84), *cert. denied,* ___ U.S. ___, 112 S. Ct. 331 (1991)).

As a threshold matter, an employee asserting a First Amendment claim must show that the speech in question "may be 'fairly characterized as constituting speech on a matter of public concern.'" *Rankin,* 483 U.S. at 384 (quoting *Connick v. Myers,* 461 U.S. 138, 146 (1983)). This determination is a question of law for the court, *Connick,* 461 U.S. at 148 n. 7, based on "the content, form, and context of a given statement, as revealed by the whole record." *Rankin,* 483 U.S. at 385 (quoting *id.* 461 U.S. at 147-48). If the court determines that the state employee's statement pertains to a matter of public concern, it must then balance the employee's interest in making the statement against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Rankin,* 483 U.S. at 388 (quoting *Pickering v. Board of Educ.,* 391 U.S. 563, 568 (1968)). In balancing the countervailing interests of the

public employee and employer under *Pickering*, the court must not consider the employee's statement in a vacuum; rather, "the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Id.*[1]

In this case, even after accepting the allegations in the complaint as true, it appears "beyond doubt" that plaintiff cannot prove any facts which would entitle him to relief. Because Sheppard's statements did not address a matter of public concern, his First Amendment rights were not implicated by his discharge. The content, form, and context of his statements reflect convincingly that they manifest a law clerk's insubordination to his employer, a state judge, and were not uttered to address a matter of public concern. He called the defendant judge "corrupt" and used the expletive "son- of-a-bitch." Complaint ¶ 14. In addition, plaintiff concedes that his statements were made in the context of his refusal to follow the defendant judge's direction to draft a decision on a pending speedy trial motion. *Id.* ¶¶ 10, 11.

It is crucial to note that the relationship between a judge and law clerk is an intensely personal and confidential one. It is a relationship of a considerably different dimension than the conventional relationship between an employer and an employee. The personal and professional demeanor of a law clerk reflects not only upon the judge with whom he works, but upon the judiciary as a whole. It is not overstating the case to say that "the punctilio of an honor the most sensitive," *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, J.), is the standard of behavior that a law

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[1]The *Pickering* balancing test is also a question of law for the court. *Piesco*, 933 F.2d at 1154-55 (citing *Connick*, 461 U.S. at 148 n. 7, 103 S. Ct. at 1691 n. 7); *but see Vasbinder v. Ambach*, 926 F.2d 1333, 1340 (2d Cir. 1991) ("We can envision cases in which the question of the degree to which the employee's speech could reasonably have been deemed to impede the employer's efficient operation would properly be regarded as a question of fact, to be answered by the jury prior to the court's application of the *Pickering* balancing test.").

clerk must observe. The plaintiff's behavior fell egregiously short of that standard. That shortfall and his insubordination, not a disregard for his First Amendment rights, compelled his discharge.

The unassailable validity of the uniqueness of that relationship, even in the context of First Amendment considerations, was plainly recognized in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), which points the way to decision here. In that case, the plaintiff, a high school teacher, was dismissed for sending a letter to a local newspaper that was critical of the way the defendant Board of Education and the superintendent of the schools had handled past proposals to increase taxes for the benefit of the schools. *Id.* at 565-66. The Court decided that the plaintiff's rights to freedom of speech were violated, but in the course of its opinion made the following observations which are peculiarly pertinent here:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, . . . we shall indicate some of the general lines along which an analysis of the controlling interests should run.
>
> . . .
>
> The [plaintiff's] statements are in no way directed towards any person with whom [he] would normally be in contact in the course of his daily work as a teacher. *Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. [Plaintiff's] employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationship for which it can persuasively be claimed that personal loyalty and confi-*

dence are necessary to their proper functioning.

Id. at 569-70 (emphasis added).

Connick v. Myers, 461 U.S. 138 (1983), is also instructive. The plaintiff there, an Assistant District Attorney, was discharged for preparing and distributing a questionnaire soliciting the views of fellow employees regarding office transfer policy, office morale, the need for a grievance committee, the level of confidence in superiors and whether they felt pressure to work in political campaigns. *Id.* at 141. This questionnaire was prepared after the plaintiff resisted a transfer to prosecute cases in a different section of the criminal court. *Id.* at 140. The reasons for her discharge were stated to be her refusal to accept the transfer and that her distribution of the questionnaire was regarded as an act of insubordination. *Id.* at 141. She then brought suit under 42 U.S.C. § 1983, contending that her employment was wrongfully terminated because she had exercised her constitutionally protected right of free speech. *Id.* The District Court ordered her reinstatement and awarded her back pay, damages and attorney's fees, holding that the true basis for her discharge was the questionnaire which involved matters of "public concern" and was not clearly demonstrated to interfere substantially with the operation of the District Attorney's Office. *Id.* at 141-42.

The Supreme Court reversed, holding that the plaintiff's discharge did not offend the First Amendment. In the course of its opinion the Court, speaking through Justice White said:

> When employee expression cannot be fairly characterized as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. . . .
>
> Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and

> context of a given statement, as revealed by the whole record.... *[Plaintiff] did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did [plaintiff] seek to bring to light actual or potential wrongdoing or breach of public trust on the part of [defendant] and others.* . . . To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark--and certainly every criticism directed at a public official--would plant the seed of a constitutional case. While as a matter good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

461 U.S. at 146-49 (emphasis added). *See also Arnett v. Kennedy,* 416 U.S. 134, 168 (1974) (highlighting importance of maintaining discipline in government offices).

Likewise, in *Berry v. Bailey,* 726 F.2d 670 (11th Cir. 1984), *cert. denied,* 471 U.S. 1101 (1985), a deputy sheriff commenced an action under 42 U.S.C. § 1983, alleging that he was terminated for exercising his First Amendment rights. *Id.* at 673. The deputy had incurred the disfavor of the sheriff when he refused to recommend to a prosecutor that certain charges be dismissed against the daughter of an influential state court judge. *Id.* at 672. All of plaintiff's statements, except for one, concerned that disagreement with his superior. *Id.* at 674. In granting the defendant's motion for judgment notwithstanding the verdict, the district court held that the employee's refusal to obey his superior was not protected by the First Amendment. *Id.* at 675.

The Eleventh Circuit affirmed, noting that:

> While corruption in the Sheriff's office is a matter of legitimate public concern, it is not so vital a matter that it

> would justify our protection of an employee's flagrant defiance of his direct supervisor.... All of *the statements* except [one] *were in direct conflict with the Sheriff.* They took place on the job and concerned [the deputy's] performance of his official duties. These statements are the kind that *Pickering* described as implicating the government's interest; they threaten office discipline and harmony in the day-to-day close working relationships with immediate superiors necessary for efficient office functioning. *Under the Pickering analysis, they are not protected speech.* . . .
>
> We agree with the district court that [the plaintiff] is trying to claim that he was fired for doing his job expeditiously and honestly. *While in this case, [the plaintiff's] approach to law enforcement might have yielded a more pristine sheriff's department than that of his superior, we cannot encourage employees to defy their employers and refuse to perform their duties every time they that the employer is running the office improperly.* This is not a case where [the plaintiff] performed his duties according to his superior's wishes, and pursued some outside course of action against the office's inadequate enforcement of the law. Such a fact pattern would have presented a closer case. On these facts, we cannot find any speech that passes the *Pickering* test and is thus constitutionally protected.

Id. at 676 (emphasis supplied). *Accord Finch v. City of Vernon,* 877 F.2d 1497, 1502 (11th Cir. 1989) (employee could be discharged lawfully if failed to heed orders of superior); *Cox v. Dardanelle Pub. Sch. Dist.,* 790 F.2d 668, 675 (8th Cir. 1986) (same holding; applying *Pickering* balancing test). *See Rankin v. McPherson,* 483 U.S. 378, 386 n. 10 (1987) (recognizing that plaintiff could have been deemed an insubordinate and would then face the possibility "of being fired for failing to follow orders"); *Connick v. Myers,* 461 U.S. 138, 163 n. 3 (1983) (Brennan, J., dissenting) (where employee answers

"No" to an employer's request to perform a lawful task in the scope of his duties, then "[a]lthough such a refusal is 'speech,' which implicates First Amendment interests, it is also insubordination, and as such may serve as the basis for a lawful dismissal.").

In his opposition papers, plaintiff artfully seeks to characterize his statements as touching upon matters of public concern involving allegations of misconduct by a state court judge. *See, e.g., Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 839 (1978); *Vasbinder v. Ambach,* 926 F.2d 1333, 1339-40 (2d Cir. 1991); *Rookard v. Health and Hosps. Corp.,* 710 F.2d 41, 46 (2d Cir. 1983). However, the content, form, and context of his statements, as set forth above, belie that characterization.

Sheppard did not make his statements "as a citizen upon matters of public interest, but instead as an employee upon matters only of personal interest." *Connick,* 461 U.S. at 147. Those statements were not made to reveal any alleged judicial misconduct because Sheppard never filed a complaint with the proper authorities. In upholding First Amendment claims of state employees, many courts note that the employee notified persons for the purpose of obtaining corrective action. *See, e.g., Vasbinder v. Ambach,* 926 F.2d 1333, 1340 (2d Cir. 1991) (upholding First Amendment claim of terminated state employee who reported wrongdoing and corruption in federally funded program to the FBI); *Rookard v. Health and Hosps. Corp.,* 710 F.2d 41, 46 (2d Cir. 1983) ("An allegation of corrupt and wasteful practices . . . *made to the city official empowered to investigate such charges,* obviously involves a matter of public concern) (emphasis added); *cf. Berry v. Bailey,* 726 F.2d 670, 676 (11th Cir. 1984) (rejecting plaintiff's First Amendment claim and noting that the plaintiff did not pursue any outside action with the proper authorities).

Here, Sheppard alleges that he observed numerous instances of judicial misconduct while he was defendant's law clerk. Complaint ¶ 7. Yet, during that four year period, he

never sought to file a grievance against defendant with the proper authorities. Instead, plaintiff told his employer of the alleged improprieties during a personal, employment dispute. This demonstrates convincingly that plaintiff was engaged in an *ad hominem* attack on the judge, and not expressing himself on a matter of public concern. *See, e.g., Barkoo v. Melby,* 901 F.2d 613, 618-19 (7th Cir. 1990) (employee did not speak on matter of public concern in commenting upon personal grievance with superiors because the speaker's motivation and choice of forum are considered in determining level of public concern); *McEvoy v. Shoemaker,* 882 F.2d 463, 466 (10th Cir. 1989) (statement of police officer did not address matter of public concern because he did not intend to disclose malfeasance of government officials, but to air his own frustrations).[2] Consequently, "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public [employer] allegedly in reaction to the employee's behavior." *Connick,* 461 U.S. at 147. Accordingly, since this Court concludes as a matter of law that plaintiff's discharge does not implicate the First Amendment because his speech did not address a matter of public concern, we need not engage in the *Pickering* balancing test, *Ezekwo v. NYC Health & Hosps. Corp.,* 940 F.2d 775, 781 (2d Cir.), *cert. denied,* ___ U.S. ___, 112 S. Ct. 657 (1991), nor does this case

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[2]It is clear that a statement made in private "does not . . . vitiate the status of the statement as addressing a matter of public concern," where indeed it relates to a matter of public concern. *Rankin,* 483 U.S. at 386 n. 11; *Givhan v. Western Line Consol. Sch. Dist.,* 439 U.S. 410, 415-16 (1979). However, since plaintiff's statements were made during the course of his insubordination, the fact that he uttered them privately--with no intent to file a grievance against defendant--is indicative of their personal nature. *See Connick,* 461 U.S. at 148 n. 8 (regardless of whether speaker chooses a public or private forum, "a [statement] *not otherwise of public concern* does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest.").

involve a discharge based on speech that contains both protected and unprotected categories of speech, *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977).

Were this Court to balance Sheppard's interest in making the statements against the State's interest in promoting the efficiency of the vital judicial services it provides through its employees, it would unhesitatingly strike the balance in favor of the State. By confronting his immediate superior, Sheppard threatened the institutional efficiency of the judiciary not only by the content of that insubordinate confrontation, but by the manner, time and place in which it occurred. *See Givhan v. Western Line Consol. Sch. Dist.,* 439 U.S. 410, 415 n. 4 (1979). There is no constitutional interest to be guarded which required Justice Beerman to tolerate the insolent insubordination of a law clerk which he justifiably believed would "undermine his authority, and destroy close working relationships." *Connick,* 461 U.S. at 154.

Sheppard's additional claims under the First Amendment must likewise be dismissed. He claims that defendant deprived him of his right to petition for redress of grievances. However, he has not pleaded a cognizable claim for deprivation of that right because this very action affords Sheppard a vehicle for redress within the court system. Similarly, his contention that he was denied access to criminal proceedings and documents, based on defendant's remarks to Sheppard from the bench in January and February 1991, must be denied. It is clear beyond doubt that defendant is clothed with complete power to manage the routine comings and goings in his courtroom, even to the extent of requiring visitors to conduct their research into court records elsewhere or excluding specific persons entirely from the courtroom. It is also worth noting, as defense counsel does, that Sheppard's access to proceedings claim hinges on the requirement that he was not permitted to review court records in defendant's courtroom; his claim does *not* assert that he was in fact denied access to the

courtroom or any court records. Accordingly, Sheppard's sub-claims under the First Amendment for violation of the rights to redress and access to criminal proceedings must be dismissed.

2. Fourth Amendment claims

Plaintiff asserts that defendant violated his Fourth Amendment rights in connection with the search and seizure of his personal effects in chambers. None of these claims warrant extensive discussion. The Fourth Amendment, applicable to the states via the Fourteenth Amendment, protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Plaintiff claims that his property was unlawfully seized when defendant prevented him from collecting his property after he was discharged. Property is seized when "there is some meaningful interference with the individual's possessory interests in that property," *United States v. Jacobsen,* 466 U.S. 109, 113 (1984), to further the investigatory purposes of government agents. *See id.* at 114, 120-21, 104 S. Ct. at 1656, 1660 (seizure of package occurred when federal agents took custody of package to determine whether it contained narcotics); *United States v. Place,* 462 U.S. 696, 701, 705-708 (1983) (travelers luggage was "seized" when government agents detained luggage while they sought to obtain a search warrant). A reasonable seizure does not run afoul of the Fourth Amendment. *Jacobsen,* 466 U.S. at 121-22.

In this case, plaintiff agrees that defendant was not investigating him for suspected criminal activity. Plaintiff simply alleges that defendant restrained him from collecting his personal effects upon his discharge, but concedes that he was able to retrieve all of his belongings approximately one week later. It is objectively reasonable for a judge to safeguard court files and to ensure that a terminated law clerk does not remove or destroy court documents in retaliation for his firing. Consequently, requiring plaintiff to return twice to

retrieve his property in the company of court officers was reasonable and does not give rise to a § 1983 cause of action.

Plaintiff also claims that defendant violated his Fourth Amendment rights by unlawfully searching his property. However, whether a search implicates the warrant requirement of the Fourth Amendment depends on whether society objectively recognizes a privacy interest in the area to be searched. *O'Connor v. Ortega,* 480 U.S. 709, 715 (1987); *United States v. Jacobsen,* 466 U.S. 109, 113 (1984). In *O'Connor,* a psychiatrist at a state hospital commenced a § 1983 action alleging that his employer violated the Fourth Amendment by conducting an unlawful search of his private office and by seizing a few personal items, which were subsequently used in an administrative proceeding. 480 U.S. at 712-13. The Court upheld the psychiatrist's cause of action, recognizing that a state employee does not relinquish his constitutional rights against unreasonable searches and seizures conducted by his employer in the employee's work area, provided that society would recognize a reasonable expectation of privacy in the area to be searched. *Id.* at 715-717. Since the plaintiff in *O'Connor* had a reasonable expectation of privacy in the personal files stored in his private office containing sensitive psychological data of his private patients, the Court held that his employer's search implicated the Fourth Amendment because society would recognize a reasonable expectation of privacy in that work setting. *Id.* at 718, 107 S. Ct. at 1498. *See also Gillard v. Schmidt,* 579 F.2d 825, 828 (3d Cir. 1978) (guidance counselor who maintains sensitive student records has a reasonable expectation of privacy in school desk).

In contrast, the plaintiff's asserted right to the exclusive dominion and control of the appurtenances of a judge's chambers is a dubious one, indeed. As has been discussed above, the relationship between a judge and his law clerk is *sui generis.* The case files, memoranda and correspondence pertaining to judicial matters which virtually inundate the chambers of a judge in large metropolitan areas, whether

found in file cabinets or desk drawers, must be deemed to be subject to the control of, and inspection by, the judge.

As the Court noted in *O'Connor:*

> Public employees' expectations of privacy in their offices, desks, and file cabinets . . . may be reduced by virtue of actual office practices and procedures, or by legitimate regulation . . . [and] some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable. . . . Given the great variety of work environments in the public sector, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.

480 U.S. at 717-18. The very nature of the work environment that pervades judicial chambers drives this Court to conclude that Sheppard had no reasonable expectation of privacy in chambers' appurtenances, embracing desks, file cabinets or other work areas. Accordingly, the Fourth Amendment claims must be dismissed.[3]

II. Plaintiff's Appeal from the Magistrate Judge's Order

This court entered a general referral of all pre-trial matters

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[3]Plaintiff also claims that his person was seized when defendant ordered court officers to remove him from chambers on December 11, 1990, and when defendant ordered him to "sit down and not speak" when he was entering and exiting the courtroom on February 11, 1991. Pl.'s Memo. of Law in Opp'n at 38-39. However, it is clear that these claims are frivolous because plaintiff's person was never "seized" as his liberty was not restrained in either of those instances. *Graham v. O'Connor,* 490 U.S. 386, 396 n. 10 (1989). After defendant discharged plaintiff on December 11, the court officers simply escorted him from chambers and from the courthouse; plaintiff was free to go anywhere else that he desired. Similarly, plaintiff's liberty was not restrained on February 11 because he was free to remain in or to leave defendant's courtroom.

to Magistrate Judge Ross on May 17, 1991. Since that time, the magistrate judge has met with counsel for the parties on several occasions and has entered several orders. Plaintiff now appeals from four separate elements assertedly incorporated into the magistrate judge's oral order at the conference of January 16, 1992:

> The four discrete rulings . . . to which plaintiff objects are (1) that counsel will not be permitted to administer oaths at the audiotaped depositions, and that plaintiff will have to provide a third person to do so in the event that Ms. Evans [counsel for defendant] arbitrarily decides not to do so; (2) that counsel will not be permitted to operate the tape machines at the depositions, and thus that plaintiff will have to provide a third person to do so at each taping; (3) that all such third persons proffered by plaintiff must be pre-screened by Ms. Evans under vague standards of competence and independence; and (4) that all audiotaped depositions taken on plaintiff's behalf must be transcribed, and that even though it is defendant, and not plaintiff, who wants them all transcribed, plaintiff must pay for all transcriptions unless he can justify shifting the costs to defendant.

Pl.'s Memo. of Law in Supp. of Pl.'s Objections to Magistrate's Orders at 2.

For the reasons set out below, the appeal as to each of these elements is denied.

As to issue number four--the matter of whether all depositions must be transcribed, and which side must pay the cost of transcription--it is clear that this matter is not properly presented for appeal. The magistrate judge's written order, labeled "For purposes of clarification" and endorsed on Sheppard's January 21 letter offering his summary of the January 16 orders, states explicitly that "no requirement was imposed that all depositions be transcribed...." ¶ 2. As regards the allocation of costs, it is clear that this question

was never in fact conclusively settled before the magistrate judge. The transcript of the January 16 conference reveals the following remarks:

> THE COURT: I would like you to brief that limited issue, okay? And not massive, just send me a letter brief, just on that issue--
>
> MR. SHEPPARD: Right.
>
> THE COURT: --not other issues.
>
> MR. SHEPPARD: Right.
>
> THE COURT: Okay?
>
> MR. SHEPPARD: Okay.
>
> MS. EVANS: The issue? I'm sorry.
>
> THE COURT: Of who bears the cost of the transcription.
>
> . . .
>
> MR. SHEPPARD: Can I get a time frame for when we're supposed to have our letter briefs in on the issue of bearing the cost of transcription?
>
> . . .
>
> THE COURT: And when I get all the briefs, then we'll have a phone conference and I'll make a decision.

Tr. 55, 59, 61.[4] This state of affairs was left unresolved, as demonstrated by plaintiff's January 21 letter, in which he states, "I cannot intelligently respond to Your Honor's request for briefing on the issue of which party bears the cost of transcription. . . . I am left with no conception as to how to address the issue left open." Letter of 1/21/92 at 2.

As to the first issue raised--who should administer the oath at depositions-- this court finds Fed. R. Civ. P. 28 dispositive:

> (c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

While Rule 28(c) is subject to waiver, the magistrate judge correctly concluded that defendant had not waived his objection. However, the question of who *should* administer oaths--specifically, whether defense counsel would be permitted to do so--was never resolved. As the January 16 transcript reveals, resolution of this question (while discussed briefly) was deferred to a later conference which apparently has never taken place. *See* Tr. 34-35. As above, this matter is not ripe for appeal.

Plaintiff's second objection of the four raised here--that he should be allowed to operate the tape recorders used at depositions--is likewise unavailing. As plaintiff himself concedes, the terms of Rule 28(c) are equally applicable to this issue. While he cites cases holding that the policy informing the Rule--to assure impartiality in the creation of the record of the deposition--is inapplicable where tape recorders are used, rather than stenographers or court

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[4]The official calendar filed with the Clerk, sometimes referred to as the "day sheet," also notes the pendency of this issue.

reporters, *see, e.g., Marlboro Products Corp. v. North American Philips Corp.*, 55 F.R.D. 487, 489 (S.D.N.Y. 1972), plaintiff fails to make the crucial distinction that those cases universally involve situations in which the attorney permitted to operate the device was not also a party. While plaintiff's proposed plan allowing him to operate the machines would require him to perform such subsidiary tasks as identifying speakers, a reading of the January 16 transcript strongly suggests that this approach would be unworkable. Not only have the proceedings in this case been marked by acrimony, but plaintiff has also conducted himself at times in a volatile manner, to say the least:

> THE COURT: Please don't get excited Mr. Sheppard. It'll be a lot easier--
>
> MR. SHEPPARD: I am very excited what does this mean--
>
> MS. EVANS: Mr. Sheppard--
>
> MR. SHEPPARD: --if she thinks that someone--
>
> MS. EVANS: Mr. Sheppard, I have--
>
> MR. SHEPPARD: That's absurd.
>
> THE COURT: Mr. Sheppard, this is one of the reasons why I have a problem with you doing everything all by yourself because you're just completely losing it. Please.
>
> MR. SHEPPARD: No, no.
>
> THE COURT: Please.
>
> MR. SHEPPARD: Okay, okay.

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THE COURT: We're having a conference in a Court of law and you know that.

. . .

THE COURT: We're not talking about sanctions [against defense counsel].

MR. SHEPPARD: I am talking about sanctions.

THE COURT: Well, I'm not talking about sanctions.

MR. SHEPPARD: Well, I think we--

THE COURT: Mr. Sheppard--

MR. SHEPPARD: We are building into this [sic] more ways of drawing it out. She says I can talk to her. She still has not returned my phone call.

MS. EVANS: Mr. Sheppard, I think that you're--

THE COURT: Mr. Sheppard, you're proving Ms. Evans' point. Please calm down.

MR. SHEPPARD: No.

THE COURT: Please calm down. What's going to happen in the middle of a deposition when you get very excited and something goes wrong with the machine? I want, I think there has got to be somebody else to run that machine. I will not permit the depositions to go forward with you running the machine.

Tr. 44, 47. In light of this illuminating record, and in light of the "clearly erroneous" standard applicable to this appeal, *see* 28 U.S.C. § 636(b)(1)(A), this court will not reverse the

prudent decision of the magistrate judge.

Finally, plaintiff objects to the decision that defendant be notified of the identity of the third-party individual(s) selected by plaintiff to operate the recording devices. It is clear to this court that the magistrate judge's order merely preserves the defendant's ability to make advance objections under Rule 28(c) or other such provisions of the Rules or applicable statutes. It is equally clear that the magistrate judge promised to resolve any disputes that might emerge concerning the propriety of that person's service. *See* Tr. 45. Under these circumstances, there is no principled basis for vacating the order of the magistrate judge.

III. Plaintiff's Motion to Vacate the Referral

Plaintiff also moves this court for an order withdrawing its earlier referral of pre-trial matters to the magistrate judge. Plaintiff contends that the magistrate judge has deliberately ignored the rules and case law governing the matters before her to plaintiff's detriment, and that she continues to engage in a course of conduct whose purpose is to deprive plaintiff of his ultimate day in court by making it "as drawn-out and expensive as possible for plaintiff to prosecute the case." Pl. Memo of Law at 5.

It is clear that a district court possesses the authority to withdraw a reference of pre-trial matters to a magistrate judge. Although neither Fed. R. Civ. P. 72 nor 28 U.S.C. § 636 addresses this question,[5] a leading commentator sensibly observes that the district court retains the power to vacate its own orders, and consequently to withdraw all or part of a referral order. *See* 7 J. Moore, Moore's Federal Practice ¶¶

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[5]It is true that both Fed. R. Civ. P. 73(b) and § 636(c)(6) permit withdrawal of a referral order in a civil case only on the basis of good cause (if by motion of the court) or extraordinary circumstances (on application of a party). Those two provisions, however, relate solely to referrals for trial on the merits upon consent of the parties.

72.02[4.-4], 72.02 [4.-10], 72.03[7.-4]. It appears that the decision rests entirely in the discretion of the district court. *Id.* In particular, under Rule 4(b) and (c) of the Standing Orders of the Eastern District on Effective Discovery in Civil Cases, a district court may enlarge or diminish the scope of a pre-trial referral order as it relates to discovery matters.

In this case, plaintiff objects to the magistrate judge's "procedural masterplan" requiring orderly resolution of discovery disputes and other disagreements. He contends that this prejudicial treatment, as well as the magistrate judge's frequent, but unspecified, disregard for applicable law, effectively deprives him of the ability to seek legal redress for his injuries. In this respect, the core of plaintiff's assertion is that as an unemployed *pro se* litigant (albeit one with a law degree) he cannot endure the lengthy procedural complications of a case such as this one.

Even a brief examination of the January 16 conference transcript, *see, e.g.,* Tr. 26-33, 42-47, indicates that the magistrate judge in this case has been called upon to show superhuman patience in the face of plaintiff's intransigence. To the extent that plaintiff disagrees with the magistrate judge's rulings, he is free to appeal them to this court, and has done so.[6] At this juncture, there is no reasoned basis for a finding that the magistrate judge has proceeded improperly, or that this court is more capable of resolving the acrimonious pre-trial disputes between the parties.

CONCLUSION

For the foregoing reasons, defendant's motion for judgment on the pleadings is granted in its entirety. This § 1983 action must be dismissed because plaintiff cannot state a cognizable claim for a First or Fourth Amendment violation under any set of facts as a matter of law. Accordingly, this

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[6]For example, plaintiff has appealed one of the January 16 rulings regarding the conduct of depositions. That appeal is addressed herein.

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Court declines to exercise supplemental jurisdiction over plaintiff's pendent state law tort claims under 28 U.S.C. § 1367(c)(3) and *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966). Plaintiff's appeal from the magistrate judge's rulings is denied, and his motion to vacate the prior referral order is also denied.

SO ORDERED.

1995 DIST. CT. DECISION (*SHEPPARD II* BELOW)

United States District Court,
E.D. New York.

Brian SHEPPARD, Plaintiff,
v.
Leon BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York, Defendant.

No. CV-91-1349.

Dec. 20, 1995.

Brian Sheppard, New Hyde Park, NY, Pro Se.

Amy Abramowitz, Assistant Attorney General, New York City, for defendant.

MEMORANDUM AND ORDER

GLASSER, District Judge:

SUMMARY

This civil rights action is before the Court on remand from the Second Circuit solely on the issue of alleged violations of plaintiff's First Amendment right to free speech. Plaintiff, Brian Sheppard ("Sheppard"), seeks a declaratory judgment, injunctive relief, and monetary damages pursuant to 42 U.S.C. § 1983 ("Section 1983"; "§ 1983"). Defendant, Judge Leon Beerman, a justice of the Supreme Court of the State of New York for the County of Queens ("Judge Beerman"), moves for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). For the reasons discussed below, the motion is granted.

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BACKGROUND

I. Factual Background

The facts of this case are summarized briefly here; they are recounted in greater detail in an opinion reported at 822 F. Supp. 931 (E.D.N.Y. 1993), familiarity with which is presumed.

The following material facts are undisputed. Sheppard worked as Judge Beerman's law clerk from October of 1986 until December of 1990. Complaint ¶ 3. This suit is based on his December 11, 1990 dismissal and events leading up to it.

Sheppard alleges that during his tenure as Judge Beerman's law clerk, he perceived many instances of judicial misconduct and attempted to dissuade the judge from engaging in such conduct. Complaint ¶ 7. Sheppard specifically alleges two instances of judicial misconduct: (1) that Judge Beerman arranged to have a case assigned to him for improper personal reasons; and (2) that on December 6, 1990, Judge Beerman ordered Sheppard to draft a decision denying a defendant's speedy trial motion for reasons unrelated to the merits. Complaint ¶¶ 9-10.

When Sheppard refused to draft the decision because he felt it was improper, Judge Beerman told him that, although Sheppard was not being discharged, "he should seek other employment if he felt that way." Complaint ¶ 11. Sheppard alleges that "he declined, saying that *he* was not the one who had acted improperly," and told Judge Beerman that he had kept notes of alleged judicial improprieties. Complaint ¶ 12. Sheppard alleges that Judge Beerman expressed concern about the notes and that Sheppard said "that he would no longer have a duty of loyalty to defendant if defendant continued to pressure him into taking part in misconduct." Complaint ¶ 13. Sheppard alleges that he called Judge Beerman "corrupt" and a "son-of-a-bitch," and alleges that Judge Beerman called him "disturbed" and "disloyal." Complaint ¶ 14.

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The following work day, Sheppard was out sick. When Sheppard returned to work on Tuesday, December 11, he was discharged and directed to leave the courthouse. Complaint ¶ 22.

II. Procedural Background

Sheppard commenced this case in April 1991 under 42 U.S.C. § 1983, alleging that his former employer, Judge Beerman, violated various Constitutional rights in the events surrounding and subsequent to Sheppard's dismissal. Sheppard Brief at 2. Judge Beerman filed an answer on May 8, 1991.

Since the time for pleadings had already closed, the defendant made a motion under Federal Rule of Civil Procedure 12(c) ("Rule 12(c)") for a judgment on the pleadings. This court heard argument in April 1992 and granted Judge Beerman's motion, dismissing the complaint in its entirety. *Sheppard v. Beerman,* 822 F. Supp. 931 (E.D.N.Y. 1993).

The Court of Appeals affirmed this court's judgment on the pleadings in all respects except insofar as the complaint alleged a violation of Sheppard's First Amendment right to free speech. *Sheppard v. Beerman,* 18 F.3d 147 (2d Cir.), *cert. denied,* 115 S. Ct. 73 (1994). In vacating and remanding that portion of the case, the Court of Appeals held that this court improperly made the factual finding that the cause of Sheppard's employment termination was insubordination, rather than the exercise of his right to free speech. *Id.* at 151. Therefore, the only claim before this court on remand is the allegation that Judge Beerman violated Sheppard's First Amendment right to free speech.

Since this court did not consider the qualified immunity claim in its initial ruling, the Court of Appeals did not review that issue. This Court examines that issue for the first time here.

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DISCUSSION

Sheppard's surviving claim alleges that Judge Beerman, acting under color of New York law, deprived him of his First Amendment right to freedom of speech. Complaint ¶¶ 5, 38. Sheppard alleges this deprivation took the form of a retaliatory dismissal for Sheppard's having accused Judge Beerman of judicial misconduct. Complaint ¶¶ 1, 18.

Judge Beerman argues in the alternative (1) that Sheppard's speech was not protected by the First Amendment because it was not on a matter of public concern;[1] and (2) that he is entitled to qualified immunity from liability for damages.

I. Rule 12(c) Standards

Judgment on the pleadings is appropriate where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings. Fed. R. Civ. P. 12(c).[2] If the Court goes beyond the pleadings

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[1]The contention that Sheppard's speech was not a matter of public concern might appear curious if not disingenuous. Since Sheppard has never alleged that he was prevented from publishing his grievance to any third party or to any body duly constituted to hear his complaint (nor does it appear that he has ever done so), the Court assumes that the defendant's contention is intended to convey that Sheppard's speech was not a matter of "public concern" in that sense.

[2]Rule 12(c) provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

to decide an issue, the Rule 12(c) motion will be treated as one for summary judgment. Id.; *Sellers v. M.C. Floor Crafters, Inc.,* 842 F.2d 639, 642 (2d Cir. 1988); *Frerks by Frerks v. Shalala,* 848 F. Supp. 340, 347 (E.D.N.Y. 1994), *aff'd* 52 F.3d 412 (2d Cir. 1995).

A motion for judgment on the pleadings may be granted when all material allegations of fact are admitted in the pleadings and only questions of law remain. *See George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.,* 554 F.2d 551, 553 (2d Cir. 1977); *Burns International Security Services, Inc. v. International Union,* 47 F.3d 14, 16 (2d Cir. 1995). In deciding a motion under Rule 12(c), the court applies the same standard as that applicable to a motion under 12(b)(6). *See Ad-Hoc Comm. of Baruch Black and Hispanic Alumni Ass'n v. Bernard M. Baruch College,* 835 F.2d 980, 982 (2d Cir. 1987). Under that test, a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)). This standard is "applied with particular strictness when the plaintiff complains of a civil rights violation." *Branum v. Clark,* 927 F.2d 698, 705 (2d Cir. 1991) (citations omitted).

There is no factual dispute as to the content of Sheppard's speech or the sequence of events leading up to his dismissal. Thus, this motion requires the Court to reach two issues of law not fully addressed in the initial consideration of this case: (1) whether Sheppard has raised a valid First Amendment claim under § 1983; and (2) whether Judge Beerman is entitled to qualified immunity from Sheppard's § 1983 damages claim.

Fed. R. Civ. P. 12(c).

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II. Prima Facie Case Under § 1983

A suit against a public official in an individual, as opposed to official, capacity "seek[s] to impose individual liability upon a governmental officer for actions taken under color of state law." *Hafer v. Melo,* 112 S. Ct. 358, 362 (1991). To raise a prima facie claim for relief under Section 1983, a claimant need allege only that some person acting under color of state law deprived the claimant of a federal right. *Green v. Maraio,* 722 F.2d 1013, 1016 (2d Cir. 1983) (citing *Gomez v. Toledo,* 446 U.S. 635, 640 (1980)); *Fields v. Soloff,* 920 F.2d 1114, 1119 (2d Cir. 1990).

In general, an employee who claims that his employment was terminated in violation of the First Amendment must establish that: (1) his speech can be "fairly characterized as constituting speech on a matter of public concern," *Piesco v. Koch,* 12 F.3d 332, 342 (2d Cir. 1993) (*citing Connick v. Myers,* 461 U.S. 138, 147-48 & n. 7 (1983)); and (2) the speech was at least a substantial or motivating factor in the discharge, *id.* (*citing Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287 (1977)).

Public Concern

Whether an employee's speech addresses a matter of public concern is a question of law. *See Luck v. Mazzone,* 52 F.3d 475, 476 (2d Cir. 1995). The more serious the nature of the public concern expressed in the speech, the more protection the speech is accorded. *See Jeffries v. Harleston,* 52 F.3d 9, 13 (2d Cir. 1995) ("[T]he closer the employee's speech reflects on matters of public concern, the greater must be the employer's showing that the speech is likely to be disruptive before it may be punished."); *Vasbinder v. Ambach,* 926 F.2d 1333, 1339 (2d Cir. 1991) ("An employee's charge of unlawful conduct . . . is given far greater weight . . . than is a complaint as to the fairness of internal office procedures.") Accusations of corruption do touch on matters of colorably

public concern. *See e.g., Rookard v. Health and Hospitals Corp.,* 710 F.2d 41, 46 (2d Cir. 1983) (allegation of "corrupt and wasteful practices . . . obviously involves a matter of public concern").

Since Sheppard allegedly voiced concern that Judge Beerman was "corrupt," the Court holds that Sheppard's speech, as a matter of law, involved a matter of public concern. Therefore, Sheppard has properly pled that element of a prima facie case under Section 1983.

Retaliatory Intent

Whether the speech was a motivating factor in the discharge "presents a question of fact." *See Piesco v. Koch,* 12 F.3d at 342. "While a bald and uncorroborated allegation of retaliation might prove inadequate to withstand a motion to dismiss, it is sufficient to allege facts from which a retaliatory intent on the part of the defendants reasonably may be inferred." *Gagliardi v. Village of Pawling,* 18 F.3d 188, 195 (2d Cir. 1994).

Sheppard's complaint describes in detail the content of his speech and the events precipitating his dismissal. Giving due deference to the fact that Sheppard has alleged an injury to his civil rights, *see Branum,* 927 F.2d at 705, the Court concludes that Sheppard has alleged sufficient facts from which a retaliatory intent may be inferred.

The Court holds that Sheppard has raised a prima facie case under Section 1983. Therefore, Judge Beerman can prevail on this motion only if, as a matter of law, he is entitled to qualified immunity.

III. Qualified Immunity

Qualified immunity may be raised "as a defense to liability at any stage in the litigation." *Alvarado v. Picur,* 859 F.2d 448, 451 n. 3 (7th Cir. 1988). Since it is an immunity from suit, and not just from liability, the Supreme Court "repeat-

edly [has] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227 (1991).

Ordinarily, qualified immunity is resolved on a motion for summary judgment. *See Harlow,* 457 U.S. 800, 818 (1982); *Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985). However, it is also proper to raise the defense of qualified immunity on a motion to dismiss, *see Landstrom v. Ill. Department of Children & Family Services,* 892 F.2d 670, 675 n. 8 (7th Cir. 1990); *Lundblad v. Celeste,* 874 F.2d 1097, 1100 n. 3 (6th Cir. 1989), *modified,* 924 F.2d 627, *cert. denied,* 501 U.S. 1250 (1991), or on motions for a directed verdict or judgment notwithstanding the verdict, *see Krause v. Bennett,* 887 F.2d 362, 368 n. 3 (2d Cir. 1989) (*citing Stubbs v. Dudley,* 849 F.2d 83, 85 (2d Cir. 1988), *cert. denied,* 109 S. Ct. 1095 (1989)).

Furthermore, it is a defense that must be affirmatively pleaded by a defendant official. *Siegert v. Gilley,* 111 S. Ct. 1789, 1793 (1991) (citing *Gomez v. Toledo,* 446 U.S. 635 (1980)); *Oliver Schools v. Foley,* 930 F.2d 248, 253 (2d Cir. 1991); *Castro v. United States,* 34 F.3d 106, 111-12 (2d Cir. 1994). Since Judge Beerman has affirmatively pleaded the defense of qualified immunity, it is a proper subject for the Court's consideration.

Standards and Policy

The doctrine of qualified immunity provides that government officials, performing administrative and executive functions, generally are shielded from suits for civil damages in § 1983 actions insofar as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *Ying Jing Gan v. City of New York,* 996 F.2d 522, 531 (2d Cir. 1993). Qualified immunity even applies in cases "where the rights were clearly established, if it was objectively reasonable for the official to believe that his acts did not violate those rights." *Frank v.*

Relin, 1 F.3d 1317, 1328 (2d Cir.), *cert. denied,* 114 S. Ct. 604 (1993); *Kaluczky v. City of White Plains,* 57 F.3d 202, 207 (2d Cir. 1995).

The policy behind qualified immunity is to protect public officials from vexatious and unnecessary litigation. *Harlow,* 457 U.S. at 817-18 ("[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad- reaching discovery."). If the district court determines that the defendant's alleged actions were those a reasonable officer could have believed lawful, the defendant is entitled to dismissal prior to discovery. See 1 Schwartz & Kirklin, *Section 1983 Litigation* § 9.25, at 577 (1991) (citing *Anderson v. Creighton,* 107 S. Ct. 3034, 3042 n. 6 (1987)).

Qualified Immunity Standards Applied

In the Second Circuit, a defendant may prevail on the defense of qualified immunity by showing that: (1) "it was not clear at the time of the official acts that the interest asserted by the plaintiff was protected by a federal statute or the Constitution"; (2) "it was not clear at the time of the acts that an exemption did not permit those acts"; or (3) "it was objectively reasonable for [the officer] to believe that his acts did not violate [the plaintiff]'s rights." *Robison v. Via,* 821 F.2d 913, 920-21 (2d Cir. 1987).

In evaluating a defense of qualified immunity, a court must analyze the specific federal right at issue in light of the specific facts of the case. *Anderson v. Creighton,* 107 S. Ct. 3034, 3039 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). The trial court "appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Harlow,* 457 U.S. at 818. In doing so, the court "focuses on the objective legal reasonableness of an official's acts." *Id.* at 819.

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When the factual record is not in serious dispute, "the application of qualified immunity is . . . ultimately a question of law for the court to decide." *See Lennon v. Miller,* 66 F.3d 416, 421 (2d Cir. 1995) (*quoting Finnegan v. Fountain,* 915 F.2d 817, 821 (2d Cir. 1990)). Thus, the Court must determine, as a matter of law: (1) the law defining the right alleged to be injured; (2) the clarity with which such law was established at the time of the alleged injury; and (3) the objective reasonableness of Judge Beerman's actions.

The Law Defining the Right

In general, government employees have "a right under the First Amendment, though not an unlimited right, to speak on matters of public concern." *Frank v. Relin,* 1 F.3d at 1328. A public employer, however, may escape liability by showing that the employee's conduct "threatened to interfere with government operations" and that this threat outweighed the employee's First Amendment rights. *See Waters v. Churchill,* 511 U.S. ___, 114 S. Ct. 1878, 1887; *Jeffries v. Harleston,* 52 F.3d 9, 13 (2d Cir. 1995).

Courts have formulated a balancing test to measure the level of First Amendment protection a public employee's speech will receive within a given government context. If the employee's interest in speaking outweighs the government's interest in promoting the efficiency of the services it performs, the First Amendment prevents the government from discharging the employee for such speech. *See Vasbinder v. Ambach,* 926 F.2d 1333, 1341 (2d Cir. 1991) (citing *Pickering v. Board of Education,* 391 U.S. 563 (1968)). This weighing of competing interests is commonly referred to as the "*Pickering* balancing test."

Determining the proper balance under *Pickering* is a matter of law. *See Connick,* 461 U.S. at 150 & n. 10. The recent Supreme Court opinion in *Waters v. Churchill* emphasized that speech by public employees receives somewhat less protection under the First Amendment than it does in

general.

> [M]any of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees. The First Amendment demands a tolerance of "verbal tumult, discord, and even offensive utterance," as "necessary side effects of . . . the process of open debate," *Cohen v. California,* 403 U.S. 15, 24-25 (1971). But we have never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public, or to the people with whom they work.

Waters v. Churchill, 511 U.S. ___, 114 S. Ct. 1878, 1886 (1994). The Supreme Court stressed that First Amendment protection is less extensive where the employer is the government because public agencies are charged, by law, with performing the services they render. *See id.* at 1887.

The Second Circuit has interpreted *Waters* to mean that the discharge of a public employee because of his speech does not violate his constitutional rights if:

> (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.

Jeffries v. Harleston, 52 F.3d at 13 (citing *Waters,* 114 S. Ct. at 1887, 1889-91). Since the Second Circuit applied these criteria to events that occurred in 1991, *see id.* it is appropriate to consider them the "currently applicable law" for the qualified immunity inquiry in this case.

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The Clarity of the Established Right

At first, it may appear that there is a paradox created by the factual issue of an employer's motive in discharging an employee and the *Harlow* test of "objective reasonableness." However, the qualified immunity analysis entails an important distinction between determining the *underlying law* governing a constitutional right and the *clarity* with which such a law is established. After carefully considering the issue, the Seventh Circuit, sitting en banc, ruled that

> despite the apparent *Harlow* paradox, an objective analysis is applicable to situations involving a public official's state of mind. *The objective determination in these cases requires that courts not consider intent* when making the final determination at summary judgment of whether the law is clearly established. . . . Thus, when intent is crucial to a party's claim, . . . the court's consideration of intent is relevant to the determination of whether a constitutional violation exists *but not in deciding if the constitutional standard was clearly established.*

Auriemma v. Rice, 910 F.2d 1449, 1453 (7th Cir. 1990), *cert. denied,* 111 S. Ct. 2796 (1991) (emphasis added). Therefore, the issue of whether a given right was clearly established at the time of an alleged constitutional violation is an objective determination that may be made as a matter of law.

Whether the challenged acts violated a "clearly protected" right is determined by reference to the law in effect at the time of the acts. *See Ying Jing Gan,* 996 F.2d at 531. In the Second Circuit, law is normally "clearly established" for qualified immunity purposes when there is a United States Supreme Court or circuit court ruling on point. *See Richardson v. Selsky,* 5 F.3d 616, 623 (2d Cir. 1993); *Jermosen v. Smith,* 945 F.2d 547, 551 (2d Cir. 1991), *cert. denied,* 112 S. Ct. 1565 (1992).

Many circuit courts have held that law is rarely "clearly

established" where the *Pickering* balancing test must be applied.[3] As a result, such courts often grant qualified immunity under these circumstances. The Sixth Circuit, for example, grants qualified immunity if, at the time of the contested employment determination, judges of reasonable competence could disagree "as to where the *Pickering* balance would ultimately come to rest." *Guercio v. Brody,* 911 F.2d 1179, 1189 (6th Cir. 1990), *cert. denied,* 111 S. Ct. 1681 (1991).

In addition, it may not have been "clear at the time of the acts that an exemption did not permit those acts." *See Robison v. Via,* 821 F.2d at 921. Courts have frequently held that clearly dissident speech is almost *per se* unprotected under the *Pickering* balancing test where an elected official's policymaking ability depends on cooperation from his subordinates. *See e.g., Watters v. Philadelphia,* 55 F.3d 886, 898 (3d Cir. 1995) ("[W]e could not expect a district attorney to run an efficient office if his first assistant were free to impugn his integrity in public"); *Propst v. Bitzer,* 39 F.3d 148,

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[3] *See, e.g., Bartlett v. Fisher,* 972 F.2d 911, 916 (8th Cir. 1992) ("[B]ecause *Pickering* 's constitutional rule turns upon a fact-intensive balancing test, it can rarely be considered 'clearly established' for purposes of the *Harlow* qualified immunity standard."); *DiMeglio v. Haines,* 45 F.3d 790, 806 (4th Cir. 1995) ("[O]nly infrequently will it be 'clearly established' that a public employee's speech . . . is constitutionally protected, because the relevant inquiry requires a 'particularized balancing' that is subtle, difficult to apply, and not yet well-defined.") (vacating district court's denial of summary judgment); *Hansen v. Soldenwagner,* 19 F.3d 573, 575-76 (11th Cir. 1994) ("[O]nly in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated 'clearly established' federal rights."); *Moore v. City of Wynnewood,* 57 F.3d 924, 935 n. 6 ("Even if [plaintiff] had shown that the *Pickering* balance tipped in his favor, he would be hard pressed to establish that his First Amendment rights were clearly established") (reversing district court's denial of qualified immunity); *see also Dahm v. Flynn,* 60 F.3d 253, 260 (7th Cir. 1994) ("*Pickering* set up a balancing approach, and a call for 'balancing' does not establish anything 'clearly,' or at all.") (Easterbrook, J., dissenting in part).

153 (7th Cir. 1994) (finding speech "highly disruptive to close working relationships in a workplace that required loyalty and confidence"), *cert. denied,* 115 S. Ct. 1400 (1995). Courts sometimes refer to such a rule as the "policymaker exception" to the general retaliatory dismissal analysis. *See Kaluczky v. City of White Plains,* 57 F.3d at 208 (collecting cases).

Sheppard argues that "in New York, where state supreme court justices are elected," the Court should accord "paramount public concern" to issues concerning judges in conducting a *Pickering*-style balancing. Sheppard Brief, at 1 (incorporating by reference, his Original Brief, at 17). However, if anything, the reasoning behind the policy maker exception suggests the opposite result. Since Judge Beerman is accountable to an electorate, there are other checks on his conduct besides internal organizational criticism.

Based on the continual flux in this area of First Amendment jurisprudence, and the policy reasons behind qualified immunity, this court would have great difficulty in holding that the law in effect at the time of Sheppard's dismissal established the violation of a "clearly established" right. *See, e.g., DiMeglio v. Haines,* 45 F.3d 790, 805 (4th Cir. 1995) ("Therefore, it was, and is, not clear that when an individual presents himself as speaking in his capacity as a public employee, that his speech is protected.") Whether or not the right in this case was "clearly established" in December 1990 is academic, however, because Judge Beerman's conduct, as a matter of law, was objectively reasonable.

The Objective Reasonableness of the Defendant's Conduct

Even where a right is clearly established, a defendant is entitled to qualified immunity if it was objectively reasonable for the official to believe that his acts did not violate that right. *See Kaluczky v. City of White Plains,* 57 F.3d at 207; *Frank v. Relin,* 1 F.3d at 1328. Hence, Judge Beerman's acts are entitled to qualified immunity if he has "adduce[d] sufficient facts [such] that no reasonable jury, looking at the

evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiffs, could conclude that it was objectively unreasonable for him to believe that he could dismiss Sheppard without violating clearly defined law. *See Frank,* 1 F.3d at 1328.

Since the Court is considering whether qualified immunity applies and not deciding the merits of the constitutional claim, it is unnecessary to determine the actual reason for Sheppard's dismissal on this motion. *See, e.g., DiMeglio v. Haines,* 45 F.3d 790, 798 (4th Cir. 1995) ("An official's entitlement to qualified immunity has never turned on whether his conduct actually violated the law; rather, it has always turned on [ ]the 'objective legal reasonableness' of [his] action.") (*citing Anderson v. Creighton,* 483 U.S. at 639). Although the Court must accept all factual allegations in the complaint as true, the Court need not accept the claimant's legal characterizations of events. *See Mitchell,* 472 U.S. at 528 ("[A] court reviewing . . . the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts ... All it need determine is a question of law").

Furthermore, as the Supreme Court recently demonstrated, in certain cases it is possible to determine, as a matter of law, that the *Pickering* balance tipped against the plaintiff.

> As a matter of law, th[e] potential disruptiveness was enough to outweigh whatever First Amendment value the speech might have had. . . . An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements.

Waters v. Churchill, 114 S. Ct. at 1891 (remanding for factual determination of which speech caused employee's dismissal).

Moreover, a holding that speech is on a matter of public concern does not preclude a holding that the speech's value was nevertheless outweighed by its potential disruptiveness, since the speech's context may be examined independently of

its content.

> [A]lthough providing an insider's perspective on an important issue, [the plaintiff] did not reveal any new information to the public . . . "An employee's first amendment interest is entitled to more weight where he is acting as a whistleblower exposing government corruption."

Moore v. City of Wynnewood, 57 F.3d 924, 933 (10th Cir. 1995) (*quoting Hughes v. Whitmer,* 714 F.2d 1407, 1423 (8th Cir. 1983), *cert. denied,* 465 U.S. 1023 (1984)). Therefore, even though the Court holds that Sheppard's speech touched on a matter of public concern, it may still conclude that the First Amendment value of the speech was outweighed by the state's interest in the efficient functioning of Judge Beerman's chambers.

Unlike *Waters,* this case presents no dispute as to the content of the speech, nor raises any genuine issue as to which speech prompted the termination of the employee. The issue of qualified immunity can be decided on the undisputed material facts. Sheppard alleges in his own pleadings that he called Judge Beerman a "son of a bitch"; stated that he would not draft the opinion assigned to him; and told the defendant that he would no longer owe him a duty of loyalty if he persisted in the alleged judicial misconduct.

Assuming the truth of the factual allegations in the complaint (that Sheppard was fired for his speech) and drawing all inferences in favor of the non-moving party (that the speech was on a matter of public concern), Judge Beerman would be entitled to qualified immunity if he reasonably believed "that he was acting in a fashion that did not clearly violate an established federally protected right." *Frank v. Relin* 1 F.3d at 1328. Under *Jeffries,* this would entail an objectively reasonable belief that (1) Sheppard's speech was likely to be disruptive; (2) that the disruptiveness of

Sheppard's speech outweighed his First Amendment interest in speaking; and (3) that he was firing Sheppard for this disruptiveness. See 52 F.3d at 13.

It is not necessary, however, to determine Judge Beerman's *actual* motive in firing Sheppard, since defendant officials are generally entitled to qualified immunity "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton,* 483 U.S. at 638 (*citing Malley v. Briggs,* 475 U.S. 335, 341 (1986)). Indeed, it is the test of "'objective legal reasonableness' that is the touchstone of *Harlow.*" *Id.* at 639.

This court holds that, as a matter of law, Judge Beerman acted within the realm of objective reasonableness in terminating Sheppard's employment. Whether Sheppard was fired for speech that was or was not on a matter of public concern is irrelevant, since under the circumstances, the *Pickering* balancing test would have tipped against Sheppard in any case. In other words, it would have been objectively reasonable for Judge Beerman to believe that whatever First Amendment value Sheppard's speech may have had was outweighed by its likely disruptiveness. Indeed, in light of Sheppard's disavowal of loyalty and his announcement that he would not draft the requested opinions, it is difficult to conceive of any other personnel action that would have vindicated "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Waters,* 114 S. Ct. at 1884 (*quoting Connick,* 461 U.S. at 142). Therefore, the Court holds that Judge Beerman is entitled to qualified immunity from damages on the First Amendment claim.

In the interest of clarity, the Court notes that this ruling does not constitute factual findings that Judge Beerman actually held certain beliefs, made specific predictions, or had a particular motive in firing Sheppard. Rather, since the qualified immunity inquiry turns on "the objective legal reasonableness of an official's acts," *Harlow,* 457 U.S. at 819,

the Court hereby holds, as a matter of law, that Judge Beerman's conduct was objectively reasonable and is protected by qualified immunity.

IV. Declaratory and Injunctive Relief

In addition to damages, Sheppard seeks a declaratory judgment and injunctive relief. Complaint at 10-11. Standing to seek injunctive and declaratory relief in a § 1983 action must be analyzed separately from standing to seek damages. *See Los Angeles v. Lyons,* 461 U.S. 95, 101-03 (1983). Therefore, the Court will briefly address whether Sheppard has standing to maintain these claims.

Injunctive Relief

In general, the standard for seeking prospective, equitable relief is quite strict. In order to gain prospective relief such as the injunction Sheppard seeks,[4] a party must demonstrate: (1) "injury in fact," which means an invasion of a legally protected interest that is (a) "concrete and particularized," and (b) "actual or imminent, not conjectural or hypothetical"; (2) a causal relationship between the injury and the challenged conduct, which means the injury "fairly can be traced

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[4]Specifically, Sheppard prays for an order

> permanently enjoining defendant, and all those acting in concert with him, from (a) stating that the reason for plaintiff's discharge or removal was anything other than his objecting to, and contemplating the exposure of, judicial misconduct; (b) interfering with the efforts of plaintiff, or anyone who wishes to assist him, in exposing such misconduct or vindicating the rights of those prejudiced by it; and (c) otherwise retaliating against plaintiff for his having exercised, or his exercising, his First Amendment rights in relation to this action or the issues involved therein.

Complaint at 10, 11.

to the challenged action of the defendant"; and (3) a likelihood that the injury will be redressed by a favorable decision, which means that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative." *See Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida,* 113 S. Ct. 2297, 2301-02 (1993).

Sheppard's claim fails on several of these grounds. First, as this decision makes plain, Sheppard has not adequately demonstrated an actionable injury. Since it is not clearly established that Sheppard's speech was protected under the First Amendment, he has not adequately demonstrated "injury in fact," let alone the requisite "real and immediate threat that [he] will be wronged again—a likelihood of substantial and immediate irreparable injury." *See Los Angeles v. Lyons,* 461 U.S. at 111.

Second, Sheppard has failed to show an "actual or imminent" threat of injury to a legally protected right. Even if Sheppard successfully demonstrated a past violation of a clearly protected legal interest, the mere fact of past injury, "while presumably affording [the plaintiff] standing to claim damages . . ., does nothing to establish a real and immediate threat that he would again suffer similar injury in the future." *Adarand v. Pena,* 115 S. Ct. 2097, 2104 (1995) (citations omitted). Sheppard has not alleged any facts from which one could infer that Judge Beerman would seek to injure Sheppard's First Amendment rights in the future.

In general, it makes little sense to enjoin through equity an action that is illegal. See 2 Dan B. Dobbs, *Law of Remedies* § 7.2(14), at 297 (2d ed. 1993). This is especially true where the plaintiff essentially seeks to enjoin the defendant from publishing defamatory statements, for which a damages action would lie in tort. *Id.* It is ironic that Sheppard, complaining of a violation of his claimed First Amendment right, should seek to enjoin the First Amendment right of Judge Beerman. Regardless of whether Sheppard could prove the allegations in his complaint, it would be antithet-

ical to the First Amendment to impose a prior restraint on Judge Beerman's speech, *see Near v. State of Minnesota,* 283 U.S. 697 (1931), or to impose on the parties an official version of events, *see Herbert v. Lando,* 441 U.S. 153, 184 (1979) ("The First Amendment bars the State from imposing upon its citizens an authoritative vision of truth.")

Although the Court has only briefly touched upon some of the factors that prevent Sheppard from obtaining a forward-looking injunction, it is manifestly plain that Sheppard falls short of the high standards articulated in *Los Angeles v. Lyons* and other Supreme Court cases. The Court therefore hold that Sheppard lacks standing to maintain a claim for an injunction restricting Judge Beerman from discussing Sheppard's dismissal. That portion of his claim is dismissed.

Declaratory Judgment

Finally, standing to seek a declaratory judgment must also be analyzed separately from standing to seek damages. *See Los Angeles v. Lyons,* 461 U.S. at 104; *Auletta v. Tully,* 576 F. Supp. 191, 197 (N.D.N.Y. 1983), *aff'd,* 732 F.2d 141 (2d Cir. 1984).

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides in relevant part:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201(a).

The Supreme Court recently emphasized that "the statute's textual commitment to discretion, and the breadth of leeway

we have always understood it to suggest, distinguish the declaratory judgment from other areas of the law in which concepts of discretion surface." *Wilton v. Seven Falls Co.*, ___ U.S. ___, No. 94-562 (1995) (slip. op., at 9) ("We have repeatedly characterized the Declaratory Judgment Act as 'an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant.'"). Therefore, this court's decision to exercise its jurisdiction over Sheppard's declaratory judgment claim is discretionary.

Traditionally, courts do not "declare" facts. E. Borchard, *Declaratory Judgments,* 391 (2d ed. 1941). Rather, declaratory judgments are designed to furnish an authoritative and reliable statement of the parties' rights. 1 Dobbs § 1.1, at 8. Sheppard seeks a declaratory judgment that Judge Beerman

> discharged plaintiff and had him physically removed from the courthouse, not for the pretextual reasons defendant has proffered, but rather for his protesting, and [sic] considering to air, judicial misconduct.

Complaint at 10-11. Since Sheppard seeks a judgment declaring the cause of his termination to be retaliation, he essentially asks this court to declare facts. Ironically, the Second Circuit remanded this case partly because this court cannot make such a determination. *See Sheppard v. Beerman,* 18 F.3d at 151 ("[T]he motive behind Sheppard's firing in his retaliation claim is clearly a question of fact . . . improper for the district court to answer . . . on a motion for dismissal on the pleadings.").

Moreover, the declaratory judgement claim presents a severe ripeness problem. In order to determine whether a claim is ripe for adjudication, courts should first determine "the fitness of the issues for judicial decision and the hardship of the parties of withholding court consideration." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967). In light of this court's grant of qualified immunity from damages, there do not appear to be any remaining issues for

adjudication, nor any hardship that could result to the parties by withholding adjudication. Sheppard has already been discharged and does not seek reinstatement to his former position. Since there remains no live "case or controversy," Sheppard's claim for a declaratory judgment is not fit for judicial decision. *See Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 138 (1974) ("[T]o the extent that questions of ripeness involve the exercise of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint.") Therefore, the case is moot inasmuch as Sheppard seeks a declaration as to the basis of his discharge.

The Court holds in its discretion that this case is neither an appropriate one for the proposed declaratory judgment, nor does it present a live "case or controversy" necessitating a ruling on these constitutional fact issues. Since "a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial," *Wilton*, at 11, this court, finding no useful purpose to be served by proceeding to the merits of Sheppard's claim for a declaratory judgment, dismisses that portion of the complaint.

CONCLUSION

The Court holds that Sheppard's speech concerned matters of public concern. However, the Court also holds that Judge Beerman's actions did not constitute violations of clearly established First Amendment freedom of speech rights in 1990. The Court further holds that it would have been reasonable for Judge Beerman to believe that he was not violating Sheppard's First Amendment rights by terminating his employment. Therefore, the Court concludes that Judge Beerman is qualifiedly immune from suit for Sheppard's damages claim. Those portions of the complaint are dismissed accordingly.

In addition, the Court holds that Sheppard lacks stand-

ing to maintain his claim for a prospective injunction; and that the case is moot as to the declaratory judgment Sheppard seeks. Therefore, the Court dismisses the remaining claims of Sheppard's complaint.

SO ORDERED.

2002 DIST. CT. DECISION (*SHEPPARD III* BELOW)

United States District Court,
E.D. New York.

Brian SHEPPARD, Plaintiff,
v.
Leon BEERMAN, Defendant.

No. 91 CV 1349(ILG).

Feb. 7, 2002.

Brian Sheppard, New Hyde Park, NY, pro se.

Amy L. Abramowitz, Ass't. Attorney General's Office, Michael B. Siller, Office of the Attorney General, New York City, for defendant.

MEMORANDUM AND ORDER

GLASSER, District Judge.

Plaintiff Brian Sheppard alleges in this action that defendant former Supreme Court Judge Leon Beerman terminated him from his position as a law clerk in violation of his free speech rights under the First Amendment to the United States Constitution. Now before the court is Judge Beerman's motion for summary judgment, as well as Sheppard's cross-motion to strike certain evidence relied upon by Judge Beerman in his motion. For the reasons that follow, Judge Beerman's motion must be granted and Sheppard's cross-motion must be denied.

Procedural History

Before turning to the motion, the procedural history of this case is briefly recounted. Plaintiff commenced this action

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in April 1991. Plaintiff's Complaint asserted several claims against Judge Beerman pursuant to 42 U.S.C. § 1983, including a claim that his discharge and Judge Beerman's conduct following the discharge violated his rights under the First and Fourteenth Amendments to the United States Constitution and several state law claims. In February 1992, Judge Beerman moved, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for judgment on the pleadings. In May 1993, this Court granted Judge Beerman's motion and dismissed the case in its entirety. *Sheppard v. Beerman,* 822 F. Supp. 931 (E.D.N.Y. 1993). Sheppard appealed and, in March 1994, the Second Circuit affirmed in part and vacated and remanded in part, vacating only this Court's dismissal of Sheppard's First Amendment freedom of speech claim and holding that this Court improperly made the factual finding that the cause of Sheppard's employment termination was insubordination, rather than the exercise of his right to free speech. *Sheppard v. Beerman ("Sheppard I"),* 18 F.3d 147, 151 (2d Cir. 1994). Judge Beerman again moved for judgment on the pleadings and, on December 20, 1995, this Court again granted his motion and dismissed the case in its entirety. *Sheppard v. Beerman,* 911 F. Supp. 606 (E.D.N.Y. 1995). While this Court found that Sheppard's speech was on a matter of public concern and that Sheppard had shown a *prima facie* case of unconstitutional discharge, it also found that Judge Beerman was entitled to qualified immunity because he had acted within the realm of objective reasonableness in terminating Sheppard's employment. *Id.* at 616. Upon Sheppard's appeal of that decision, the Second Circuit again reversed, holding this time that this Court had erred in finding that Judge Beerman's actual intent was irrelevant and in not permitting plaintiff to engage in discovery to support his claim of unconstitutional motive. *Sheppard v. Beerman ("Sheppard II"),* 94 F.3d 823, 828-29 (2d Cir. 1996). The parties have engaged in extensive discovery, over the course of which this Court has denied dozens of objections by Sheppard, many of them frivolous, to the Magistrate Judge's

discovery rulings.

Judge Beerman now moves for summary judgment on the ground that his actions did not infringe on Sheppard's First Amendment rights and that, even if Sheppard could demonstrate such an infringement, he is entitled to qualified immunity. Sheppard also has cross-moved to strike certain deposition transcripts, affidavits and other documents upon which Judge Beerman relies in his summary judgment motion. Because Sheppard has failed to adduce any evidence, direct or circumstantial, from which it can be inferred that Judge Beerman's decision to terminate Sheppard from his employ was prompted by anything other than a desire to ensure an effective working relationship, and the efficient conduct of his Chambers, Sheppard has failed to demonstrate the existence of a genuine issue of material fact that would permit a jury to conclude that his free speech rights under the First Amendment were violated. Summary judgment therefore must be granted as against Sheppard.

Factual Background

While the operative facts in this case are recited in both of the Second Circuit's opinions and in this Court's previous orders, extensive discovery--consisting of 31 depositions of Judge Beerman and his two sons, other sitting and retired judges, active and former district attorneys, and court personnel, and various document requests and interrogatories--has supplemented those facts and they therefore are summarized here.[1]

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[1]Before examining Sheppard's factual allegations, a brief word must be said about the form in which those allegations have been submitted to this Court. In addition to a 43-page Memorandum of Law in Opposition to the Motion for Summary Judgment, Sheppard has filed a 116-page document labeled "Plaintiff's Statement Pursuant to Local Rule 56.1 and Federal Rule of Civil Procedure 56(E) in Opposition to Defendant's Motion for Summary Judgment." Local Rule 56.1 requires parties opposing a motion for summary judgment to submit "a separate,*short* and *concise* statement of

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Sheppard served as a law clerk to defendant. New York State Supreme Court Judge Leon Beerman, from 1986 until his termination on December 11, 1990. Sheppard testified at his deposition that on December 6, 1990, he and Judge Beerman had a discussion concerning Judge Beerman's contemplated ruling on a speedy trial motion in a pending murder case, *People v. Mason & Williams.* According to Sheppard, Judge Beerman asked Sheppard to draft a decision on that motion which Sheppard believed would be unfairly prejudicial to Williams and not based on the merits. Sheppard avers that Judge Beerman wanted him to draft the decision without considering the arguments raised by the defendant, whose papers in opposition Sheppard had not yet seen. Upset with this request, Sheppard claims that he said to Judge Beerman: "Well why don't you have the district attorney's office write the decision since you don't even want me to look at the moving papers. You just say to deny it and that they have done a good job." (Sheppard Dep. at 127.) During his deposition Sheppard acknowledged that this comment was sarcastic but claimed that it was meant not as a sign of disrespect for Judge Beerman, but as an expression of "disrespect for what he was doing." (*Id.* at 128.) Sheppard elaborated at his deposition that he felt that Judge Beerman was railroading Williams because of the pressure exerted by

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the material facts as to which it is contended that there exists a genuine issue to be tried." (Emphasis added). Sheppard's so-called Rule 56.1 Statement, apart from the fact that it ignores the Rule's requirement that a statement be "short and concise," is problematic for the simple reason that it is not limited to facts as to which it is contended that no genuine triable issue exists, but is instead rife with opinions, legal arguments, and blatant conjectures that clearly are disputed in this litigation. Nonetheless, because Sheppard's Memorandum of Law contains no application of the facts in this litigation to the applicable law identified by Sheppard other than a reference to the Rule 56.1 "Statement", this Court is forced to parse through that "Statement" in an attempt to discern whether Sheppard has demonstrated the existence of a genuine material issue of fact which would render summary judgment inappropriate.

the prosecutor, who was allegedly very upset about the lenient sentence Williams had received in a related drug case, and the publicity generated by the case. While Sheppard admits that Judge Beerman never expressed to him or to anyone else his opinion about Williams' guilt or about the ultimate merits of the case, Sheppard avers that Judge Beerman was telling him, in effect: "'I want this case to go to trial. I want you to dismiss the speedy trial motion, to rule against it without a hearing regardless of the merits.' In light of all of that, I call that railroading." (*Id.* at 143.) Inconsistent with his belief that Williams was being railroaded was Sheppard's acknowledgment that Judge Beerman never expressed an opinion about the ultimate merits of the Williams case and never expressed an opinion about the guilt or innocence of Williams. Sheppard inferred that Judge Beerman felt that Williams was guilty based upon his (Sheppard's) belief "that he thought [Judge Beerman] probably thought Williams was probably guilty." (*Id.* at 144.) Sheppard felt that Judge Beerman was "going to do his part, based on the pressure he was getting, to do everything he could consistent with what he thought was beyond the bounds of his propriety to help the prosecutor to get a conviction, so that no one could say there was an acquittal." (*Id.* at 144.) Sheppard also believed that Judge Beerman had unfairly accommodated the prosecution's request to schedule the trial after December on the theory that a jury would be less likely to convict during the holiday season.[2] (*Id.* at 365-69.) As it turned out, however, Williams' case was subsequently dismissed by Judge Beerman. (*Id.* at 144- 45.)

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[2]Sheppard's allegations concerning the pressure Judge Beerman faced to be tough on crime were framed within what he deemed to be a more general dynamic plaguing the judiciary in New York, namely "that judges here were doing what they were doing because it was what the public wanted. The public wanted criminal defendants put away by hook or by crook, and the judges were doing that." (Sheppard Dep. at 239.)

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Judge Beerman's recollection of the discussion on December 6 was not that he had instructed Sheppard to draft a decision in the case, but that he had simply told Sheppard that he wished to proceed with the case without unnecessary delay, as the case had already been pending for several years and as he had already denied a speedy trial motion by Williams once before. Judge Beerman fully expected that he and Sheppard would discuss the case the next day. (Beerman Aff. ¶¶ 7, 8.)

On the morning of December 7, 1990, Sheppard testified that he came to chambers and informed Judge Beerman that he refused to work on the speedy trial motion in the *Williams* case because of his belief that the defendant was being railroaded by Judge Beerman. (Sheppard Dep. at 150.) According to Sheppard, Judge Beerman disagreed with Sheppard's accusation that he was railroading Williams and maintained "that all that he had told me was that he would prefer it if the motion can be decided quickly, if it could be." (*Id.* at 350.) Notes prepared by Sheppard after this conversation[3] reflect that Judge Beerman told Sheppard that there was

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[3]On December 7, following this confrontation, Sheppard prepared a series of notes documenting what had transpired between himself and Judge Beerman, to which repeated reference was made during Sheppard's deposition. (Notes prepared by Sheppard on Dec. 7, 1990, marked for identification as Def.'s Ex. 1 ("Dec. 7, 1990 Notes").) Sheppard revealed in subsequent deposition testimony that he prepared these written notes for two reasons: the first being that he wanted to have some insight as to whether or not Judge Beerman was searching his office and the second being that, assuming Judge Beerman was in fact searching his office, he wanted to suggest that he planned to report this allegation of corruption. (Sheppard Dep. at 247.) Besides containing a recitation of the events that had transpired between himself and Judge Beerman, the notes included the names of members of the Commission of Government Integrity and judges who had been accused of corruption. (*Id.* at 247-49.) Sheppard testified that he hoped that Judge Beerman would not come in to his office at all, but that, in the event he did come in, the notes would serve both to scare Judge Beerman and also allow Sheppard to find out whether Judge Beerman was searching through his office because he likely would mention

no railroading taking place, to which Sheppard responded "'that he should drop the lies and face the truth.'" (*Id.* at 163 (quoting Dec. 7 Notes).) Sheppard then "told [Judge Beerman] to stop fooling himself and that it was obvious what was going on [,]" by which Sheppard meant the railroading.

At that point, Sheppard recounts that Judge Beerman specifically told him: "Well, if that's how you feel, then you should look for another job." (Sheppard Dep. at 151.)[4] Sheppard testified, however, that Judge Beerman informed him that he was not being fired. (*Id.* at 177.) In response, Sheppard recalled telling Judge Beerman: "Why should I look for another job? You're the corrupt son of a bitch doing these things, and I am innocent, and I'm just saying I don't want to do it. So why should I have to look for another job?"[5] During his deposition, Sheppard claimed that he was saying to Judge Beerman, in effect: "I will expose you if you fire me." (Sheppard Dep. at 164.) When asked whether Sheppard meant this as a threat, he answered:

> No. It was meant to try to, well, just let him know that, in fact, that was going to happen. I also told him that if my only choice was to take part in the misconduct or to look for another job, then I was going to expose him. Also, if

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something he saw in the notes. (*Id.* at 249-50, 265-66.)

[4]Later in his deposition, Sheppard stated that: "He said, after I had told him that I had taken notes, and some other things were said, then he ultimately said, 'Why didn't you look for a job somewhere else?' You know, 'Why didn't you go back to Legal Aid?' " To which Sheppard testified that he replied: "I said I wanted to work as a law secretary, and I didn't see any reason why I shouldn't continue working there. I wasn't doing anything wrong." (Sheppard Dep. at 161.)

[5]At another point in his deposition, Sheppard recalled saying: "'[T]his whole thing would blow up if he tried to fire me, since I was not going to be the unemployed one, where he's the corrupt judge and I'm the innocent party.'" (*Id.* at 164 (quoting Dec. 7, 1990 Notes).)

> he fired me, I was going to expose him. I just let him know these were the options.

(*Id.* at 165.) Sheppard also testified that he was attempting to convey to Judge Beerman: "I'm letting you know full ahead, if you fire me or if you force me to resign, this is going to come out." (*Id.* at 182.) Judge Beerman then told Sheppard that he had misunderstood his intentions with respect to the motion in the *Williams* case, but Sheppard insisted upon his belief that Judge Beerman was treating the defendant in that case unfairly. (Beerman Dep. at 151.)

Sheppard further testified:

> Well, after I called him a corrupt son of a bitch, then he said, he got upset, and said, 'We can't have you saying that,' and then I said, 'Look, you're right. I'm sorry I called you a son of a bitch. I shouldn't have said that, but as far as the corruption goes, you know, you are doing these things, you know what you told me about Williams is not what happened, and you know it. You've been doing things in other cases.'

(*Id.* at 152-153.)

At this point, Sheppard avers that Judge Beerman asked him to provide specific examples of what, other than his accusation concerning the *Williams* case, Sheppard felt Judge Beerman had done improperly. (*Id.* at 154.) Judge Beerman too recalls asking Sheppard to explain what he meant in accusing him of being corrupt, and Sheppard answered: "Never mind. You know what." (Beerman Dep. at 223-25, 256-57.) Sheppard recounted:

> And I said, you know, 'I've seen you make decisions where you just decide one thing contrary to what you believe, you know. You're doing the thing on the *Babarcich* case, and, you know, you may feel it's okay when

> you just come out with a decision, saying things, and no one knows what you're really doing, and you can just say to me, 'I don't believe that police officer,' and then write your opinion you do, and no one knows, and I have sat there and watched it. But for you to say to me that the fight we had yesterday over this never happened,' I said, 'who do you think you're kidding? Just because you're a judge, you can't say the moon is blue, and it's blue.' I said, 'You and I both know what happened yesterday.'

(*Id.* at 152-53.)

The *Babarcich* case, which Judge Beerman was then trying, was a vehicular manslaughter case in which Sheppard also felt that Judge Beerman was improperly succumbing to prosecutorial pressure. Sheppard testified at his deposition that, shortly after Babarcich's arrest, the prosecutor in the case came into chambers by himself with an article about the arrest and told Judge Beerman: "Take a look at this, remember Babarcich, he was just arrested for killing the father of five children in a drunk driving case. . . . I just want to remind you that this was your case and he's out now on a stay of your sentence" (*Id.* at 156.) After the prosecutor left, Sheppard testified that:

> [Judge Beerman] turned to me and said he was very angry, and he said, 'I'm going to revoke his probation. I'm going to violate his probation.' And then I said, 'No, you are not able to do that. You are not going to do that.' And then he said, 'Don't give me any of your--' these are his exact words-- 'legalistic arguments. I'm going to do it.' And I said, 'There's no way you can do it. He's not going to be charged with a violation of probation.'

(*Id.* at 156-57.) Sheppard testified that he believed that, after this conversation with the prosecutor, Judge Beerman had tried to get the vehicular manslaughter case assigned to him so that he could "exact revenge" on Babarcich by obtaining a

conviction, since Babarcich already had a criminal case pending before Judge Beerman when he was rearrested. (*Id.* at 153, 155- 57, 168.) Babarcich's sentence in that prior criminal case, a low level felony drug case, had been stayed and Babarcich had been arrested in the second case for driving while intoxicated and killing the father of five children. (*Id.* at 156.)

Besides informing Judge Beerman that he felt he had acted improperly in the *Babarcich* case, Sheppard referred, vaguely, to how he remembered other "very serious things" Judge Beerman had done, but he did not offer any other specific instances of misconduct. Sheppard contends that Judge Beerman then asked him how he remembered what had happened in the earlier *Williams* case, because that case had been tried a year earlier. Sheppard replied: "That's not the sort of thing one forgets, and any of the other misconduct." (*Id.* at 351.) Sheppard then informed Judge Beerman that he had kept notes concerning Judge Beerman's misconduct which he would make public if he forced him to resign.[6] (*Id.*) Sheppard also told Judge Beerman: "My mother told me that I'm like the snake on the flag that says 'don't tread on me.'" (*Id.* at 182; Beerman Dep. at 90.)

According to Sheppard, Judge Beerman expressed shock at these accusations and told Sheppard that he was "disturbed" and "disloyal" and asked him what he planned to report. (Sheppard Dep. at 351.) Judge Beerman's recollection of Sheppard's demeanor during this conversation is as follows:

> You [Sheppard] were ranting and raving about irrelevant matters and making statements that made no sense, and just continued by telling me I couldn't fire you. I don't know why. You didn't explain why, and that you could-

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[6]Because Sheppard only prepared these notes after the conversation on December 7, this statement was false.

> n't take it any more and you couldn't stand and watch what was going on, and I asked you, 'I don't know what you're talking about. What did you ever see? What did you ever hear? What did you ever watch?' You never gave me any responses except repeating over and over again. That's it.

(Beerman Dep. at 218.) Sheppard alleges that, after the confrontation, he offered to go home so that Judge Beerman could think about the situation. However, Judge Beerman instructed Sheppard to remain at work, which he did.

That evening, Judge Beerman conferred with his son, an attorney, and came to the realization that he and Sheppard could no longer work together in view of Sheppard's behavior and its deleterious impact on the working relationship. (Beerman Dep. at 96-97.) Judge Beerman resolved to speak with Administrative Judge Alfred Lerner about the incident when he returned to the courthouse on the following Monday, December 10, 1990.

Sheppard did not appear at work on the Monday following this incident. On that Monday, December 10th, Judge Beerman attempted to reach Judge Lerner, but was told by his secretary that he would not be able to participate in a meeting until the following day. On December 11, 1990, Judge Beerman spoke with Judge Lerner about the incident. Judge Lerner was astonished at Sheppard's behavior and confirmed Judge Beerman's view that Sheppard could no longer remain in either Judge Beerman's employ or the employ of the court system. (*Id.* at 378.) Judge Lerner also told Judge Beerman that he could terminate Sheppard for cause or for no reason at all, since Sheppard was not a civil servant. (Lerner Dep. at 34.) At that point, Judge Beerman determined that Sheppard would be discharged. (Beerman Dep. at 386.) Given Sheppard's outburst of a few days earlier, Judge Lerner expressed concern about how Sheppard might react to the news of his termination and suggested that court officers deliver a letter of termination to Sheppard and

that he be asked to leave the building immediately. (Lerner Dep. at 17-19, 27-28, 31-34.) Court officers did deliver such a letter to Sheppard when he arrived in chambers on December 11, four days after the December 7 confrontation and the first working day that Sheppard actually appeared at the courthouse.

Several days later, Sheppard was permitted to return to chambers to retrieve his personal belongings, all of which had been placed in a box by Judge Beerman's secretary. Although he cannot provide any evidence of or corroboration for his belief, Sheppard contends that, in the intervening days between his termination and his retrieval of his personal belongings, Judge Beerman searched Sheppard's office and read the notes he had prepared with the intention of scaring Judge Beerman and leading him to believe that he might be "exposed." (Sheppard Dep. at 246-52, 267.)

Both Sheppard and Judge Beerman testified that, prior to this incident, the two had enjoyed a cordial working relationship. (Beerman Dep. at 70.) Judge Beerman was not aware of any complaints Sheppard had lodged either to him or to anyone else about Judge Beerman's allegedly unethical conduct (*Id.* at 590; Beerman Aff. ¶ 11), and Sheppard acknowledged that he had never before made any such complaints (Sheppard Dep. at 114.) Sheppard also acknowledged that he was unaware of anyone else making allegations that Judge Beerman was corrupt, either to Sheppard or to anyone else.

Despite his apparent satisfaction with his job and employer, Sheppard claimed that he eventually became frustrated by the countless acts of judicial misconduct he had witnessed, both on the part of Judge Beerman and other judges in Queens. In 1989, Sheppard decided to contact a reporter for the New York Times to discuss misconduct in the Queens County Supreme Court generally, only to be told that the New York Times would not be interested in reporting on a story concerning Sheppard's observations. Sheppard never approached the New York State Commission on Judicial

Conduct (the "Stern Commission") because he felt that the Commission had handled prior investigations into judicial misconduct poorly and would likely by ineffectual in addressing the misconduct allegedly witnessed by Sheppard. After his discharge, Sheppard decided not to "go public" with the accusations because he continued to feel that the Stern Commission lacked independence in its investigations into judicial misconduct, because he feared retribution, and because he believed that his only "refuge" was in the federal courts.

On the basis of these facts, Judge Beerman contends that Sheppard has failed to unearth any evidence whatsoever that he was acting with an improper motive when he terminated Sheppard. To the contrary, Judge Beerman maintains that all of the evidence produced by Sheppard points to the inescapable conclusion that the termination came about because Judge Beerman believed that Sheppard's words and actions on December 7, 1990 had irreparably destroyed their working relationship and the efficient functioning of his chambers, not because he wanted to prevent Sheppard from exposing his baseless and inexplicable illusion of Judge Beerman's corruption, or for any other improper purpose. Sheppard, on the other hand, maintains that the case must proceed to trial because the events leading up to and following his termination suggest an impermissible motive on Judge Beerman's part to prevent Sheppard from engaging in speech that touched on an important issue of public concern.

Discussion

I. The Governing Standard

Summary judgment "shall be rendered forthwith if the pleadings, depositions . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A "moving party is 'entitled to

judgment as a matter of law' [if] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). In deciding a summary judgment motion, a court need not resolve disputed issues of fact, but need only determine whether there is any genuine issue to be tried. *Eastman Mach. Co. v. United States,* 841 F.2d 469, 473 (2d Cir. 1988). A disputed fact is material only if it might affect the outcome of the suit under the governing law. A genuine factual issue exists if there is sufficient evidence favoring the nonmovant such that a reasonable jury could return a verdict in her favor. *Anderson v. Liberty Lobby. Inc.,* 477 U.S. 242, 248-249 (1986). "In assessing the record to determine whether there is a genuine issue of fact, the court is required to draw all inferences in favor of the party against whom summary judgment is sought." *Ramseur v. Chase Manhattan Bank,* 865 F.2d 460, 465 (2d Cir. 1989).

Summary judgment in cases involving a government employee's assertion of free speech rights is appropriate where the employee has failed to articulate genuine issues of fact as to the actual reason for the employee's discharge. *McCullough v. Wyandanch Union Free Sch. Dist.,* 187 F.3d 272, 282 (2d Cir. 1999); *Giacalone v. Abrams,* 850 F.2d 79, 88 (2d Cir. 1988). In order to establish a *prima facie* case sufficient to avoid summary judgment, a plaintiff "must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on" an illegal motivation. *Stern v. Trs. of Columbia Univ.,* 131 F.3d 305, 312 (2d Cir. 1997). Summary judgment is appropriate where the inference of improper motivation is based not on reason, but on "mere speculation or conjecture[,]" *Bickerstaff v. Vassar Coll.,* 196 F.3d 435, 448 (2d Cir. 1999), *cert. denied,* 120 S. Ct. 2688 (2000), or "from thin air[,]" *Norton v. Sam's Club,* 145 F.3d 114, 119 (2d Cir. 1998). General attacks on a defendant's credibility or honesty do not

by themselves provide sufficient evidence to defeat summary judgment. *Crawford-El v. Britton,* 523 U.S. 574, (1998).

A plaintiff seeking to establish a *prima facie* case of retaliation for speech protected under the First Amendment must point to evidence sufficient to establish three elements: (i) the plaintiff engaged in constitutionally protected speech; (ii) the plaintiff was subjected to adverse action or was deprived of some benefit; and (iii) the protected speech was a "substantial" or a "motivating factor" in the adverse action.[7] *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977). Although "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of public employment[,]" the government may exercise broader power to regulate the speech of its employees than over private citizens. *Connick v. Myers,* 461 U.S. 138, 140 (1983). Thus, government employees have a limited right under the First Amendment to speak on matters of public concern. *Id.* at 146; *Frank v. Relin,* 1 F.3d 1317, 1328 (2d Cir. 1993). The government's ability to exercise this broader power is due to the fact that the government's interest in the efficient discharge of public

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[7]In regard to this element, and bearing in mind that under the Unified Court System in New York, law clerks are personally appointed and serve at the judge's pleasure and that Sheppard understood that "a State Supreme Court Judge has the power to hire and fire at will" (*See infra* at 25-26), it is important to note the following observation: "A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with [such a] rule . . . is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision--even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such employee is placed in no worse position than if he had not engaged in that conduct." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 285-86 (1977).

services is substantially more significant when it is acting as an employer rather than as a sovereign:

> The government's interest in achieving its goals as efficiently and effectively as possible is elevated from a relatively subordinate interest to a significant one when it acts as an employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Waters v. Churchill, 511 U.S. 661, 675 (1994).

To accommodate the competing interests of the government employer and the employee, the Supreme Court has formulated a two-part test for determining whether an employee's speech is protected under the First Amendment. *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968). The issue of whether a plaintiff was engaged in protected speech is a question of law for the court, and the employee bears the burden of proving that his actions were constitutionally protected in the particular circumstances. *See Connick,* 461 U.S. at 148 n. 7 & 150 n. 10 ("Because of this obligation, [the court] cannot 'avoid making an independent constitutional judgment on the facts of the case.'") (quoting *Jacobellis v. Ohio,* 378 U.S. 184, 190 (1964) (Brennan, J.)); *see also Williams v. Bd. of Regents of Univ. Sys. of Ga.,* 629 F.2d 993, 1003 (5th Cir. 1980) (the "ultimate balancing of interests of citizen and state with regard to first amendment protection . . . remains in the sphere of the court").

The first part of the so-called "Pickering balancing test" requires the court to ask whether the speech at issue addressed a matter of public concern. *See Rankin v. McPherson,* 483 U.S. 378, 385 (1987) ("The threshold question in applying this balancing test is whether [the employee's] speech may be 'fairly characterized as constituting speech on a matter of public concern.'") (citations omitted). Next, the court must

weigh the employee's interest in speaking against the government's interest in promoting the efficiency of the services it performs through its employees. *Pickering,* 391 U.S. at 568; *McCullough,* 187 F.3d at 278-79. With respect to this showing, "the [government]'s burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Frank,* 1 F.3d at 1329 (alteration in original) (quoting *Connick,* 461 U.S. at 150). Only if an employee can satisfy both parts of this test, thus proving his or her speech was protected, should the court move on to determining whether the last two elements of a cause of action for retaliation--adverse action and motivation--are present.

In *Sheppard II,* the decision vacating this Court's dismissal of the Complaint pursuant to Rule 12(c), the Second Circuit noted that, in weighing the potential disruptiveness of the speech against the employee's interest in engaging in that speech, the court must find not only that the employee's interest in engaging in the speech was outweighed by its potential disruptive impact, but also that the employer took the adverse action *because* of that potential for disruption, and not because the employee threatened to disclose actual or potential wrongdoing:

> It is clear, though, that a government official may, in certain circumstances, fire an employee for speaking--even on a matter of public concern--where that speech has the potential to disrupt the work environment. *See Rankin v. McPherson,* 483 U.S. 378, 384, 97 L.Ed.2d 315, 107 S. Ct. 2891 (1987). In *Jeffries v. Harleston,* 52 F.3d 9 (2d Cir.), *cert. denied,* 133 L.Ed.2d 114, 116 S. Ct. 173 (1995), we stated that termination does not violate the employee's First Amendment rights where:
>
> > (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer

> took action against the employee based on this disruption and not in retaliation for the speech.

52 F.3d at 13; *see also Waters v. Churchill,* 511 U.S. 661, ___, 114 S. Ct. 1878, 1889-91, 128 L.Ed.2d 686 (1994); *see generally Board of County Comm'rs v. Umbehr,* 135 L.Ed.2d 843, ___ U.S. ___, 116 S. Ct. 2342, 2347-48, 2352 (1996). Thus, even if the potential disruption to the office outweighs the value of the speech, the employer may fire the employee only because of the potential disruption, and not because of the speech. That is to say, it matters not that the potential disruption outweighs the value of the speech if the employer subjectively makes the speech the basis of his termination decision: such "retaliatory" discharge is always unconstitutional.

Sheppard II, 94 F.3d at 827-28. Because the issue on appeal to the Second Circuit was this Court's dismissal of the Complaint on the grounds that Judge Beerman was entitled to qualified immunity, the panel then turned its attention to that defense, which it described in broad terms as follows:

> As with any "constitutional tort," a governmental employer (such as a state court judge) may be entitled to qualified immunity for firing an employee in apparent breach of the First Amendment. *See Tompkins,* 26 F.3d at 607; *Frank,* 1 F.3d at 1327-28. If the employer's firing of the employee actually violates the employee's First Amendment rights, the employer will nonetheless be qualifiedly immune from suit if an objective, reasonable officer could believe that the firing did not violate the employee's rights. *See Anderson v. Creighton,* 483 U.S. 635, 638, 97 L.Ed.2d 523, 107 S. Ct. 3034 (1987); *Frank,* 1 F.3d at 1327-28.

Sheppard II, 94 F.3d at 827-28. Having set out this standard,

the panel went on to note that there existed a potential tension between the constitutional test for a First Amendment violation--which contemplates inquiry into the subjective state of mind of the employer--and the qualified immunity test--which is focused on the reasonable belief of an objective employer:

> This case presents the risk of conflating a constitutional test that focuses, at least in part, on the subjective state of mind of the actor--the employer's actual motive for firing the employee--with the objective focus of the qualified immunity doctrine. Obviously, applying an objective test to a subjective element is a contradiction in terms: it would compel an inquiry as to whether a person reasonably could have thought that he in fact thought something.

Id. at 828. Moreover, the panel found that by dismissing the Complaint on the grounds that an objective judge reasonably could have thought that the potential for disruption caused by the speech outweighed the value of that speech, this Court improperly had held that Judge Beerman's actual motivation was irrelevant, effectively denying Sheppard the opportunity to adduce evidence of unconstitutional motive. Instead of subjective intent simply dropping out, the panel stated that the subjective state of mind of the employer is not irrelevant to the qualified immunity inquiry:

> Contrary to the district court's decision, the employer's actual (subjective) motive is not irrelevant in a qualified immunity inquiry. Rather, where the subjective state of mind of the actor is part of the constitutional mix, we have developed a rule that balances the interests of the official claiming immunity against the interests of the employee asserting unconstitutional motive:
>
> Upon a motion for summary judgment asserting a

> qualified immunity defense in an action in which an official's conduct is objectively reasonable but an unconstitutional subjective intent is alleged, the plaintiff must proffer particularized evidence of direct or circumstantial facts . . . supporting the claim of an improper motive in order to avoid summary judgment.

Blue v. Koren, 72 F.3d 1075, 1084 (2d Cir. 1995).[8] This standard allows an allegedly offending official sufficient protection against baseless and unsubstantiated claims, but stops short of insulating an official whose objectively reasonable acts are besmirched by a prohibited unconstitutional motive. *See Tompkins,* 26 F.3d at 607-08.

Thus, to defeat Beerman's claim of qualified immunity, Sheppard must show "particularized evidence of direct or circumstantial facts" supporting his claim of unconstitutional motive.

Id. at 828. The panel further noted that, in view of a Complaint that alleged that Judge Beerman had expressed deep concern over Sheppard's claim to have kept notes detailing his corruption and the possibility that those notes would be made public, this Court's dismissal prior to discovery deprived Sheppard of the chance to prove that these allegations were true, and that Judge Beerman's decision to terminate Sheppard was motivated by an impermissible desire to suppress protected speech.

> If substantiated through discovery, these facts may tend to show that Beerman's actual motive for firing Sheppard was the content of his speech, and not Beerman's fear that Sheppard would disrupt the office working environment.
> . . .

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[8] *Blue* was decided six days after this Court issued its decision dismissing Sheppard's Complaint on the basis of qualified immunity.

> The district court therefore erred in finding that Beerman's actual intent was "irrelevant," and in not allowing Sheppard discovery to support his claim of unconstitutional motive. If, after sufficient discovery, Sheppard cannot present particularized (direct or circumstantial) evidence of unconstitutional motive, Beerman is then, but only then, entitled to summary judgment on the grounds of qualified immunity.

Id. at 829. Accordingly, the Second Circuit instructed that the Complaint could not be dismissed as a matter of law on the basis of qualified immunity even where a belief on the part of Judge Beerman that the speech in question would cause a disruption that outweighs the value of that speech was objectively reasonable. Rather, the court held that Sheppard had a right to conduct discovery on the subjective motive of his employer and to substantiate his claim of unconstitutional motive with particularized evidence.

In this motion, Judge Beerman argues that summary judgment must be entered against Sheppard both because he has failed to demonstrate any genuine factual issues which would support his *prima facie* case of a First Amendment violation and because, even if he could do so, Judge Beerman would be entitled to qualified immunity because Sheppard has failed to elicit any evidence, particularized or circumstantial, of an improper subjective motivation on Judge Beerman's part.

II. Judge Beerman's Motion for Summary Judgment

In this case, the record is clear that Judge Beerman took adverse action against Sheppard by terminating him and that Judge Beerman's actions were motivated entirely by Sheppard's outburst on December 7. The deciding issue, therefore, is whether Sheppard's speech was protected by the First Amendment. Whether Sheppard's speech was protected turns first on whether it touched on matters of public concern and,

second, on whether Judge Beerman's interest in the efficient operation of chambers outweighed Sheppard's interest in commenting on and exposing his questionable opinions regarding Judge Beerman's alleged corruption.

In a prior opinion, this Court found that Sheppard's speech touched upon a matter of public concern, 911 F. Supp. at 611 and now turns to consider whether Sheppard's interest in commenting upon such matters is outweighed by Judge Beerman's interest in maintaining the efficient operation of his Chambers.

A. Was Sheppard's interest in engaging in speech on a matter of public concern outweighed by Judge Beerman's interest in maintaining effective workplace?

In considering whether or not Sheppard's interest in engaging in the speech at issue was outweighed by Judge Beerman's interest in ensuring the smooth functioning of his chambers, a great deal of deference is owed to Judge Beerman's decision in this matter. *See Connick,* 461 U.S. at 151-52 ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."); *Heil v. Santoro,* 147 F.3d 103, 109 (2d Cir. 1998) (granting summary judgment against plaintiff police officer whose interest in speaking on matter of public concern did not outweigh department's right to punish him for his insubordination and holding that "[s]ubstantial weight is accorded the government employer's [reasonable] prediction that given speech has the potential for disruptiveness"). The *Rankin* Court stated:

> In weighing the State's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency.

> The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails.

Rankin, 483 U.S. at 390-91. The *Rankin* Court quoted *Connick v. Myers,* 461 U.S. at 147, as follows: "absent the most unusual circumstances a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Rankin,* 483 U.S. at 384 n. 7. "The more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer." *McEvoy v. Spencer,* 124 F.3d 92, 103 (2d Cir. 1997) (quoting Craig D. Singer, Comment, Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Association, 59 U.Chi.L.Rev. 897, 901 (1992), and citing *Caruso v. De Luca,* 81 F.3d 666, 670 n. 3 (7th Cir. 1996); and *Hall v. Ford,* 856 F.2d 255, 261- 64 (D.C.Cir. 1988)). Thus, the nature of the employee's position is critically important in the free speech balancing test. *McEvoy,* 124 F.3d at 103. ("Indeed, where the employee holds an extremely confidential or highly placed advisory position, it would be unlikely if the Pickering balance were to be struck in his favor. The tremendous disruption to the public workplace likely to result from the critical speech of such an employee would in most cases outweigh any First Amendment interests possessed by that employee.")

That Sheppard both occupied and saw himself as occupying a position of confidentiality is beyond dispute. A law clerk "is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function." *Oliva v. Heller,* 839 F.2d 37, 40 (2d Cir. 1988). Under New York State's Unified Court System, law clerks are personally appointed and serve at the judge's pleasure. Because a law clerk often is privy to a judge's thoughts and

decision-making processes, the "importance of a cooperative and confidential relationship with staff members" cannot be overemphasized and the absence thereof "is disruptive and inevitably impairs the operation of any court." *McDaniel v. Woodard,* 886 F.2d 311, 316 (11th Cir. 1989) (quoting *Abbott v. Thetford,* 529 F.2d 695, 705 (5th Cir. 1976) (Gewin, J., dissenting), *rev'd. on rehearing en banc,* 534 F.2d 1101).

During his deposition, Sheppard demonstrated a full understanding of the importance of an effective and mutually trusting working relationship between a judge and his law clerk. Although Sheppard could not recall precisely whether Judge Beerman had explained to him that it was important for a judge and his clerk to have a relationship of mutual confidence and respect, he "imagined" that Judge Beerman had done so. (Sheppard Dep. at 64.) Sheppard stated that he "absolutely" understood that a judge needed to rely on his law secretary to maintain the confidentiality of what took place in chambers and needed to have trust in his law secretary, both in his legal ability and in his ability to get along with the judge. (*Id.* at 65) When asked if he had "any opinion about whether[,] if a judge perceived that his law secretary did not have confidence in him or her[,] that might be problematic for the judge?", Sheppard responded: "Yes, I think that would be problematic for the judge." (*Id.* at 66.) Sheppard acknowledged, moreover, that a judge "certainly" would be justified in seeking a new secretary if the judge thought that he did not have the confidence of his current secretary and that:

> under the law, except for certain limitations, a state Supreme Court judge has the power to hire and fire at will, but--so if you're asking me--so they can just do it, and I think the law recognizes that. But I think it's a good thing that a judge has the ability to hire and fire someone in that position if the judge doesn't--if the judge wants to feel comfortable and doesn't. The judge loses trust. For any of things, I think a judge should be able to fire the

law clerk, you know, provided that none of the other legal rules are disobeyed.

(*Id.*) When asked whether a judge would have a legitimate basis for terminating a law clerk who yelled at the judge or who told the judge that he was a nasty person, Sheppard could not clearly answer the question.

A careful reading of Sheppard's deposition, which extended over a period of three days and 655 pages of transcript (to which he appended 42 pages of errata sheets) reveals not a jot or tittle of particularized evidence, direct or circumstantial, of a motive to discharge Sheppard other than his insubordination and a concern for the maintenance of an efficient and effective Chambers. In that regard, a sampling of Sheppard's own deposition testimony is revealing:

Q. Do you understand the term "insubordination?"

A. It's sort of a loose term that I have a gist of, but I think I even looked it up, and it has different meaning and connotations, and I think it's sort of used loosely. So I have a general idea, but I have often felt that it's not exactly clear what it means.

For example, I think one of the definitions I saw was someone who is insubordinate is someone who doesn't follow authority. . . . And then for example, the unemployment people told me that cursing at one's employer and then having an emotional outburst in front of the employer, that for their purposes of determining unemployment, that is insubordination.

Q. Do you consider cursing at your employer an act of insubordination?

A. Again, it depends what you mean. They have their own purposes, and what one means by insubordination, if it basically--*I was even being insubordinate before that,*

> *if its being rebellious against authority or rejecting authority. I was expressing that when I simply said, "I won't work on this motion."* (Emphasis added).

(*Id.* at 204-05 and Errata p. 15.)

* * *

> Q. After you accused the judge of being corrupt and calling him a son of a bitch, do you think it's fair to assume that he lost confidence in you?
>
> A. Well, it depends what you mean by "confidence." I think he probably lost confidence as soon as I told him I wasn't going to work on the Williams case.
>
> Q. You said earlier that it's important for a judge to have confidence in his law secretary, correct?
>
> A. Yes.
>
> Q. And if the judge loses confidence in his secretary, it can undermine an effective working relationship?
>
> A. Absolutely. . . .

(*Id.* at 180.)

As for his own conduct, Sheppard was asked whether, in the days following the incident, he felt embarrassed or that he might have overstepped his boundaries, to which he replied: "Not at all." (*Id.* at 192.)

That a judge who loses the confidence and trust in his law clerk is justified in terminating that law clerk's employment is not at issue here, as Sheppard does not question that principle. Instead, the only question that remains is whether Judge Beerman's decision to terminate Sheppard was

motivated by his belief that Sheppard's actions had destroyed their working relationship or, by a desire to prevent Sheppard from engaging in the speech and advancing his accusations of misconduct. Because all of the evidence before the court, which is discussed in greater detail below, leads to the undisputable conclusion that Judge Beerman was motivated by a desire to maintain harmony in the workplace and, to preserve the efficiency and effectiveness of his Chambers, and not by a desire to suppress Sheppard's speech, summary judgment must be granted as against Sheppard.

Despite his claim of improper motive, Sheppard's deposition reeks with evidence that simply could not be interpreted by a reasonable fact-finder to suggest an improper motive, and, in fact, clearly establishes that Judge Beerman was motivated by a desire to ensure the smooth functioning of his chambers. First is Sheppard's own admission that he was insubordinate when he expressed an unwillingness to perform the work Judge Beerman had asked him to perform. During his deposition, Sheppard acknowledged that on December 7, 1990, the day of his confrontation with Judge Beerman, he explicitly refused to draft an order in the manner Judge Beerman had directed him to. (*Id.* at 150-151.) A more direct form of disruption to the workplace can hardly be imagined.

Next, despite Sheppard's contention that Judge Beerman was acting with the unconstitutional desire to prevent him from bringing to light his accusations of misconduct, Sheppard's own account of the events that transpired on the day of the confrontation compel the conclusion that Judge Beerman did not prevent Sheppard from taking action on his threats of exposure. Sheppard testified that Judge Beerman told him that he should consider looking for another job if he felt that he had improperly handled the *Williams* speedy trial motion. At that point, Sheppard stated that Judge Beerman was "the corrupt son of a bitch doing these things" (*Id.* at 161), and that "this whole thing would blow up if he tried to fire me, since I was not going to be the unemployed one,

where he's the corrupt judge and I'm the innocent party" (*id.* at 164 (quoting Dec. 7, 1990 Notes)). That Judge Beerman proceeded to fire Sheppard under any reasonable interpretation of the facts, compels the conclusion that Judge Beerman invited Sheppard to take action on his threats and reveal his allegations of corruption. Sheppard's acknowledgment that Judge Beerman discharged him after he threatened to "go public" with the allegations of corruption if discharged itself belies the existence of an intent on Judge Beerman's part to silence Sheppard, since it would be reasonable to infer that Judge Beerman would not have fired Sheppard if he actually feared exposure. Stated another way, Sheppard's contention that Judge Beerman was motivated by a desire to suppress speech concerning matters of public concern is *disproved,* rather than proved, by the act of termination, since that act, as described by Sheppard, was akin to an invitation to speak.

The third factor pointing to a lack of improper motivation is the absence of any suggestion in the record, either before or after the termination, that Sheppard was ever prevented from engaging in speech critical of Judge Beerman--from which an improper motive on Judge Beerman's part might be inferred. When asked whether Judge Beerman had ever prevented him from revealing his allegations of judicial misconduct to the press, the Stern Commission or any other governmental body, Sheppard acknowledged that neither Judge Beerman nor anyone else had ever done so. (*Id.* at 579.) Even when Sheppard confronted Judge Beerman with his accusations of wrongdoing and informed him, falsely, that he had maintained notes on his desk blotter detailing this wrongdoing, Judge Beerman never attempted to induce Sheppard not to reveal his accusations or share his notes with anyone. Nor is there any evidence in the record, other than pure speculation on Sheppard's part, that Judge Beerman ever searched for those notes or otherwise became aware that Sheppard was amassing evidence of his alleged wrongdoing. In fact, it is plain from the record that Sheppard was never prevented from speaking but, rather, that the

reason he did not engage the public in his accusations of impropriety was that he was concerned about possible negative repercussions to himself.

Nor can Sheppard offer any evidence that Judge Beerman attempted to stop Sheppard from approaching the press or someone within the courts with his allegations. In fact, Sheppard freely acknowledged that he chose not go to anyone within the courts with his concerns and also that he was never prevented from doing so. Sheppard went to great lengths during his deposition to explain why he failed to take any efforts to "expose" Judge Beerman. The reasons he cited were threefold: (i) the lukewarm reaction of the press during his initial communications with reporters; (ii) his belief that corruption was so deep-seated that no one would ever do anything about it, other than punish him; and (iii) his lack of trust in the officials charged with investigating corruption. Interestingly, none of the reasons Sheppard cites involve any effort by Judge Beerman to silence him. Sheppard maintained, for example, that once his concerns surfaced, he did not approach anyone because: "First, before I would go to anyone, I wanted to seek how widespread this was." (*Id.* at 86.) While Sheppard acknowledged that he was not trained as an investigator, he felt that other people were not better suited to determine the scope of alleged corruption because he was "on the inside" and therefore had a "better ability to do that." (*Id.* at 87.) Sheppard acknowledged, moreover, that he never researched whether he had a duty to report his perceptions of corruption, but chose to focus first on whether there was someone to whom he could have reported those perceptions.

Other portions of Sheppard's deposition reveal someone who was aware of several possible entities he could have approached with his accusations of judicial misconduct, but simply chose never to do so. Sheppard admitted that he was aware of an office within the state government known as the Commission on Judicial Conduct (*id.* at 88-89)--also known as the Stern Commission after its head, Gerald Stern--which

had been formed to field complaints about corruption. However, Sheppard testified that he "wasn't really sure what the [Stern Commission's] mission is" and that he never contacted it about Judge Beerman. (*Id.* at 89.) When asked why he did not contact the Stern Commission, Sheppard cited "a bunch of reasons." Foremost, Sheppard testified--with an ironic degree of expertise and familiarity, despite his professed ignorance of the Stern Commission's purpose--that the Commission "had a reputation for or [has] been largely criticized for going after sort of small fish, villages, small upstate villages and not really doing anything about judges who were higher up[.]" (*Id.* at 90.) Sheppard also testified that over time he read reports by the Stern Commission and concluded that its members could not be trusted to carry out the disciplinary measures needed to address the misconduct he felt was being perpetuated by the Bench in Queens County.

> [D]espite what was obvious to me, that at least in Queens misconduct was rampant[,] Judges, Supreme Court Judges basically never get, at least publicly, disciplined or barely disciplined at all by them, and when they do, it never has anything to [do] with the sort of things I was seeing and, you know, one seriously has to wonder. Obviously this is going on, and either no one is complaining, which has to make you wonder if this is going on, and so many people know and no one else is complaining, why aren't they complaining, and are they complaining and nothing is being done about it. That was [an] additional concern. Then I read about the Murphy case, which made me and a lot of other people have serious questions about the Commission on Judicial Conduct.[9]

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[9]Sheppard testified at another point in his deposition that Murphy was a case in which two court employees were fired after they sent an anonymous letter to a high-ranking court employee in which they reported misconduct on the part of Judge Murphy. (Sheppard Dep. at 223.)

(*Id.*) Sheppard also revealed that he feared the negative repercussions to himself if he were to approach the Stern Commission with his allegations of misconduct on the part of Judge Beerman. When asked whether it was his belief that one of the reasons that he did not report the perceived misconduct of Judge Beerman was that essentially nobody would care, he replied: "Yes. Or care in a sense of actually doing something about it, other than having me get hurt. Yes." (*Id.* at 91.) In essence, it is perfectly clear from the record that Sheppard was in no way prevented from approaching the Stern Commission for any reason other than his own belief that complaining to the Stern Commission would create problems for himself. In a lengthy Errata Sheet he subsequently prepared, Sheppard elaborated on the reasons that he decided not to approach the Stern Commission, stating that he feared the possibility that he himself might be disciplined if his complaints were determined by the Stern Commission to be unfounded. (Sept. 25, 1998 Errata Sheet at pp. 2-9, attached as Ex. B to Def.'s Notice of Motion.)

Besides the Stern Commission, Sheppard also testified that he was aware of a commission that had been formed specifically to investigate allegations of corruption in Queens County. According to Sheppard, that commission, known as the Commission of Government Integrity, was headed initially by Joseph Califano, and eventually by John Feerick, the highly respected Dean of Fordham Law School. Sheppard testified that, in the Fall of 1987, two staff members from the Commission of Government Integrity came to interview Judge Beerman in his chambers. Sheppard had heard of the Commission and knew that they were investigating corruption and improprieties throughout state government. However, Sheppard never attempted to contact the Commission of Government Integrity about his concerns (Sheppard Dep. at 216), reasoning that "word could have gotten back to Judge Beerman and that I would just get fired, and nothing else would happen" (*id.* at 222). Nor did

Sheppard consider writing an anonymous letter, as he didn't "know what good that would do" (*id.*), and because he feared the potentially harmful consequences of even an anonymous complaint.[10] (*Id.* at 222-23.)

As for other possible avenues of recourse, Sheppard testified at his deposition that he chose not to approach the press because he "found out in 1989 that it seemed the press wasn't interested either." (*Id.* at 92.) That year, Sheppard called a legal reporter at the New York Times with whom he had attended Stanford Law School and with whom he shared a mutual friend. Sheppard testified that he told the reporter "that I was a law clerk, that there were things going on in Queens that were wrong and that I thought the Times might be interested in it." (*Id.* at 95.) Eventually, Sheppard met with the reporter, but Sheppard had decided not to reveal his specific allegations against Judge Beerman, because he felt that Judge Beerman was "one of the fairer judges" in Queens who didn't engage in "some of the more egregious misconduct."[11] (*Id.* at 96.) Instead, Sheppard spoke in general terms

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[10]This concern for the consequences to himself may prompt the question as to whether he was speaking as a citizen at all upon a matter of public concern rather than for himself as a self-appointed avenger of imagined corruption of the entire Supreme Court of Queens County about which no other responsible person did or would care. Whether speech touches upon a matter of public concern must be decided by the content and context in which the statement is made. In making that determination, the Court may consider the attempt made by the employee to make his concerns public along with the motivation for his speech.*See Connick,* 461 U.S. at 138, 147-148; *Morgan v. Ford,* 6 F.3d 750, 754 (11th Cir. 1993); *Pappas v. Giuliani,* 118 F. Supp. 2d 433, 443 (S.D.N.Y. 2000).

[11]Sheppard reiterated this assessment of Judge Beerman several times during his deposition, stating once that he did not take detailed notes about all of the allegations of misconduct because he felt uncomfortable:

> I tried to avoid taking notes about something Judge Beerman did wrong, if it was just him. There were times where someone else did something, and in a way, in order to talk about what happened, I'd

about the alleged misconduct of the Queens judiciary and recalled making the following comments to the reporter:

> I see in Queens all sorts of wrong things that are being done from behind the scenes, and they're basically clearly violating the rights of criminal defendants, and then he ultimately said, well, it sounds like a really ~~big~~ thing, you know, maybe it needs a book and not an article. He said, I don't think they will be interested because the Times is more concerned with national and international news, and they don't really care about what goes on in the city. And then he also said, and besides, I don't think the public will really care if judges are doing things to violate the rights of criminal [defendants].

(*Id.* at 96.) Thus, it is plain that prior to his discharge, Sheppard decided not to air his allegations concerning Judge Beerman to the New York Times, not because Judge Beerman

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have to include Judge Beerman. I usually tried to make it as nice as I could, because I felt uncomfortable. I mean, again, here I was in a situation where I seemed in a lawless world where what is supposed to be was not so. I didn't know what to do, and as I said, in the scheme of things, Judge Beerman seemed fairer and to follow things better than many of the judges. Whether it was most, I really didn't know. But from some of the other things I was hearing, he just seemed fairer and better, and it just seemed kind of unfair for me to be sitting there taking down everything he did, and plus he was doing too much anyway.

(Sheppard Dep. at 109.) Later in his deposition, Sheppard explained that although he felt that the environment he worked in was corrupt, he decided not to leave his job in part because of his ambivalence about Judge Beerman. "It was--I was, you know, got along well with Judge Beerman . . . : And it also seemed to me there was a lot of justice going on. Judge Beerman was a hard working judge in the, you know, in the, in most of the cases. You know, he was fair. He gave fair trials in almost all the cases. A lot of good things were being done. He listened to my advice very often." (*Id.* at 111.)

or anyone else prevented Sheppard from approaching the press, but rather because, based on his prior discussions with the newspaper about corruption allegations concerning the Queens judiciary generally, it became clear to him that the newspaper was not interested in publishing those allegations. Again, nothing in Sheppard's deposition even remotely suggests that Sheppard was prevented from sharing his perceptions of misconduct with this or any reporter.[12] Even assuming that all of Sheppard's characterizations of these government commissions are true--that is, that judicial corruption was so endemic that it was tolerated by the very

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[12]Also clear from the record is the fact that Sheppard was not inhibited from speaking after his termination on December 10, 1990. After his termination, Sheppard never reported Judge Beerman's alleged misconduct to the Stern Commission. At his deposition, Sheppard elaborated on the reasons why he neglected to report the alleged misconduct to the Stern Commission: first was the "Stern Commission's reputation for not dealing with this sort of thing, plus my looking at the Stern Commission reports, which sort of corroborated that, they basically never did anything with Supreme Court judges, and certainly nothing along the lines that I was concerned about. And basically, they seemed never to do any--basically, with all this going on, it seemed no one ever reported what was going on in Queens to them." (Sheppard Dep. at 104.) Sheppard did, however, come close to reporting his allegations of misconduct to the press following his termination. During his deposition, Sheppard testified that he spoke with another reporter from the New York Times after his discharge and that an attorney who was briefly representing him in connection with the discharge contacted a third New York Times reporter after filing the complaint in this action about the possibility of the New York Times running a story on the discharge. Ultimately, however, it was Sheppard's decision "that I didn't want to have this published in the press immediately, that I first wanted to look at the legal issues involved and what legal ramifications that would have, and also what other choices I had." (*Id.* at 104.) In an Errata Sheet, Sheppard adds that, shortly after his termination, he contacted two reporters at New York Newsday and that, in 1994, shortly after the Second Circuit's decision reversing this Court's dismissal of the complaint, he contacted the New York Times, the ABA Journal, the National Law Journal, the Village Voice, New York Newsday, USA Today, the Washington Post, and American Lawyer. (Sept. 25, 1998 Errata Sheet at p. 9.)

body charged with its investigation and condemnation--and further assuming that the public would not be interested in his claims, there is no reason to believe that Judge Beerman would have feared Sheppard's exposing him. By Sheppard's own calculations, Judge Beerman--and all the other judges on the Queens bench for that matter--could rest assured that Sheppard's allegations, even if true, would never be taken seriously.

Of considerable significance is the fact that Sheppard was addressing Judge Beerman directly and vulgarly when calling him a "corrupt son of a bitch." In this regard, the decision of the Supreme Court in the seminal case of *Pickering v. Board of Education,* 391 U.S. 563 (1968), may be regarded as dispositive. In that case, Marvin Pickering, a high school teacher, was fired by the Board of Education for sending a letter to a local newspaper criticizing the way the Board and the district superintendent of schools handled proposals to raise new school revenues. He claimed that he was fired because he was exercising a right protected by the First Amendment in writing his letter to the newspaper. The Supreme Court of Illinois was reversed insofar as its opinion suggested "that teachers may be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the schools in which they work . . . ." The Court then went on to write what has ever since been a firmly established principle that "the problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

Exquisitely applicable to this case is the following declaration by the Court:

An examination of the statements in appellant's letter

> objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds . . ., and of both the Board's and the superintendent's methods of informing, or preventing the informing of, . . . the real reasons why additional tax revenues are being sought for the schools. *The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. There is no question of maintaining either discipline by immediate superiors or harmony among co-workers presented here.* Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent, are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct . . . may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

Id. at 569-70 (Emphasis added).

The footnote dropped by the Court at that point was also very prescient. In it, the Court wrote:

> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such

> situations, but merely note that significantly different considerations would be involved in such cases.

Id. at 570 n. 3.

Some years later, in *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979), the Court commented on its decision in *Pickering* as follows:

> The *Pickering* Court's decision upholding a teacher's First Amendment Claim was influenced by the fact that the teacher's public statements had not adversely affected his working relationship with the objects of his criticism.
>
> * * *
>
> Although the First Amendment's protection of government employees extends to private as well as public expression, striking the *Pickering* balance in each context may involve different considerations. When a teacher speaks publicly, it is generally the *content* of his statements that must be assessed to determine whether they "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." [391 U.S.] at 572-573, 88 S. Ct. at 1737. Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time and place in which it is delivered.

Id. at 415 nn. 3-4.

The precise applicability of those observations which are persuasively dispositive of this case are self-evident. Sheppard's statements were directed towards Judge Beerman in a manner that can only be characterized as personally

confrontational, and which did more than threaten the institutional efficiency of Judge Beerman's Chambers; it made the continued maintenance of discipline and harmony in his Chambers impossible to contemplate. It is difficult to imagine a rule that would require a judge to retain a law clerk whose abrasive, insubordinate and vulgarly disrespectful conduct towards him condemns his Chambers to a state of interpersonal and professional paralysis even if, in addition to firing him because of it, that conduct may have also inevitably been on his mind. *See, e.g., Doyle,* 429 U.S. at 285.

Sheppard's attempt to support his claim that Judge Beerman was improperly motivated in terminating him by references to Judge Beerman's conduct before, during and after his termination is hopelessly futile. A meticulous review of the deposition testimony fails to disclose a scintilla of evidence to support that claim.

III. Cross-Motion

In his Cross-Motion to Strike, Sheppard challenges various statements or exhibits contained in Judge Beerman's submissions in support of his motion for summary judgment. Although Sheppard rejects Judge Beerman's suggestion that he is advancing a *per se* challenge to Judge Beerman's deposition testimony, Sheppard cannot seriously characterize his challenge to the testimony and affidavits offered by Judge Beerman as anything but sweeping.

As a general principle, it should be noted that Judge Beerman's reference to depositions and affidavits not only is appropriate, but explicitly contemplated by the Federal Rule of Civil Procedure. Rule 56(c) provides that summary judgment is appropriate "if the pleadings, *depositions,* answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (emphasis

added). The rule plainly contemplates that the parties may rely on deposition testimony and is not limited to the deposition testimony of the parties. Rule 56(e), in turn, provides that "supporting and opposing *affidavits* shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein." Fed. R. Civ. P. 56(e) (emphasis added). Plaintiff's broad challenge is particularly strange in light of his own heavy reliance on deposition testimony, and the testimony of others, in his submissions in opposition to the summary judgment motion, including hearsay and opinion evidence. Sheppard's far-reaching challenge to unspecified material in the affidavits and depositions must therefore be rejected as meritless.

Sheppard next argues that various statements contained in Judge Beerman's Rule 56.1 Statement must be stricken because they contain hearsay and opinion testimony. These statements include: (i) Judge Beerman's descriptions of the *Williams* and *Babarcich* cases (Rule 56.1 Statement ¶ 8); (ii) Judge Beerman's statement that he told Sheppard: "Well, if that's how you feel, then you should look for another job." (*id.* ¶ 15); (iii) Judge Beerman's statement that prior to the December 7, 1990 incident, neither Sheppard (nor anyone else) had ever objected to anything that Judge Beerman had done (*id.* ¶ 35); (iv) Judge Beerman's reliance on Sheppard's own testimony that he was not aware of anyone making allegations or findings that Judge Beerman was corrupt and that nobody ever told Sheppard that they felt Judge Beerman was corrupt or had acted improperly (*id.* ¶¶ 38-39); (v) Judge Beerman's description of the reasons why he spoke to his son after the December 7 confrontation (*id.* ¶¶ 40, 43); (vi) Judge Beerman's statement that his son, Alan Beerman, recommended that Judge Beerman speak with the Administrative Judge, Judge Lerner (*id.* ¶ 41), a statement which is repeated in any event in Alan Beerman's deposition (A. Beerman Dep. at 44); (vii) portions of Alan Beerman's deposition testimony which arguably contain impermissible opinion testimony (*id.*

¶ 42); and (viii) Judge Lerner's statement to Judge Beerman that Sheppard was an at-will employee (*id.* ¶ 52).

With one exception, this Court need not consider the statements contained in the Rule 56.1 Statement in order to determine that summary judgment is appropriate. With respect to the fourth statement, the Court finds that this statement simply summarizes Sheppard's testimony during his deposition that he was not aware of anyone making allegations or findings that Judge Beerman was corrupt and therefore is an admission against interest. In addition, the statement is based on personal knowledge and is not being offered to prove Judge Beerman's character. Rather, it is being offered to support Judge Beerman's position, and the position apparently acknowledged in this statement by Sheppard, that there was nothing in Judge Beerman's background that would have led him to fear "exposure" after Sheppard accused him of corruption.

Sheppard finally maintains that certain statements contained in the affidavit of Joanne Blais, who worked as Judge Beerman's secretary at the time Sheppard was discharged, must be stricken because they consist of impermissible opinion testimony and hearsay. Because this Court did not need to consider the challenged statements--in which Blais states (i) that she heard Sheppard mention "something about Nazi Germany" (Blais Aff. ¶ 4); (ii) that Judge Beerman told her that Sheppard had called him a corrupt son of a bitch (*id.* at ¶ 9); and (iii) that Judge Beerman appeared to be very upset about the incident with Sheppard (*id.* at ¶ 10)--in deciding the motion for summary judgment, Sheppard's challenges to those statements need not be addressed here.

Having determined that summary judgment is warranted without reference to the affidavits, testimony or documents which Sheppard alleges may not be considered by the court in his Cross-Motion to Strike, the court need not reach the merits of Sheppard's Cross-Motion to Strike, and therefore it is denied.

SHEPPARD III BELOW

Conclusion

For the foregoing reasons, Sheppard has failed to adduce and evidence, direct or circumstantial of improper motive which precludes the defendant's motion for summary judgment on his First Amendment free speech claim. On the record presented, no reasonable juror could infer from the facts alleged by Sheppard that the termination resulted from an unlawful desire to curb speech on a matter of public concern rather than a legitimate desire by Judge Beerman to maintain the efficiency, discipline and harmony of his public office. Accordingly, summary judgment is hereby directed to be entered as against Sheppard and the case is dismissed in its entirety.

SO ORDERED.

MAGISTRATE JUDGE'S MARCH 31, 1998
DISCOVERY ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIAN SHEPPARD,
Plaintiff,

-against-

LEON BEERMAN,
Defendant.

MEMORANDUM
AND ORDER
91-CV-1349 (ILG)(RML)

LEVY, United States Magistrate Judge:

Presently before the court is plaintiff's motion to compel discovery. For the reasons stated below, plaintiff's motion is granted in part and denied in part.

BACKGROUND

For purposes of this decision, the court assumes familiarity with the underlying facts. Briefly, plaintiff Brian Sheppard ("plaintiff or "Sheppard") served as a law clerk to New York State Supreme Court Justice Leon Beerman from October 1986 until he was discharged in December 1990. (Complaint, ¶¶ 3, 22). Plaintiff alleges that on December 6, 1990, Justice Beerman engaged in *ex parte* communications with the prosecution in a pending murder case, *People v. Mason and Williams*, after which he ordered plaintiff to draft a decision denying one defendant's pending speedy trial motion without a hearing, regardless of the motion's merits, so that the defendant would stand trial at a time advantageous to the prosecution. (Complaint, ¶¶ 9, 10). Plaintiff allegedly refused to follow Justice Beerman's direction, stating that he would not take part in the "railroading" of the defendant. (Complaint, ¶ 11). Justice Beerman allegedly responded that, although plaintiff was not being discharged, he should seek

other employment if he felt that way. (*Id.*)

During the course of this discussion, which quickly escalated into a heated argument, plaintiff allegedly informed Justice Beerman that he had taken extensive notes of instances of other judicial misconduct during the preceding four years. As an example, plaintiff noted a pending case, *People v. Babarcich*, that Beerman had allegedly assigned to himself in order to take personal revenge against the accused. (Complaint, ¶ 12). Plaintiff claims that Beerman expressed concern as to whether and when plaintiff intended to make the notes public. (Complaint, ¶ 13). Harsh words were exchanged: Sheppard called Beerman "corrupt" and a "son of a bitch," and Beerman called Sheppard "disturbed" and "disloyal." (Complaint, ¶ 14). Sheppard immediately apologized, and the argument ended with no resolution. (Complaint, ¶ 15). When Sheppard next returned to work on December 11, 1990, after calling in sick on Monday, December 10, 1990, he was removed from chambers by court officers who informed him that Beerman had terminated his employment the previous day. (Complaint, ¶ 22).

Sheppard commenced this action in April 1991, alleging, *inter alia*, that Beerman's actions violated his First Amendment right to free speech. Specifically, plaintiff alleges that Beerman fired him in "retaliation for plaintiff's protesting and considering to expose judicial misconduct and obstruction of his attempts to air the misconduct and vindicate his rights and those persons prejudiced by it." (Complaint, ¶ 1).

In addition to the extensive discovery he has taken thus far, plaintiff now seeks to compel discovery to support his allegations of judicial "corruption." Specifically, he seeks to take discovery from a multitude of non-parties, including former and current Queens Courthouse staff, judges, assistant district attorneys, and others who he believes might have knowledge regarding alleged instances of corruption on the part of defendant and numerous other unnamed judges. He argues that evidence of defendant's actual corruption "would provide the jury with strong reasons to believe that . . .

[plaintiff's] speech was a substantial factor in his discharge; that Defendant's interest in properly running his office did not outweigh Plaintiff's interest in the speech; that Defendant's proffered reasons for the discharge are pretextual; that Defendant would not have discharged Plaintiff but for the content of the speech; and that Plaintiff is entitled to not only compensatory, but punitive, damages." Moreover, he contends that evidence of widespread corruption on the part of other judges will support his explanation for why he did not resign and seek employment with another judge or "blow the whistle" earlier; according to plaintiff, he believed "in light of the vastness and toleration of the corruption in the New York State criminal justice system . . . that any attempt to blow the whistle would be futile; would result in far greater retaliation against him by others than Defendant personally could exact; and would be somewhat unfair to Defendant, who appeared less corrupt than many of the other judges and prosecutors in the system." Plaintiff further maintains that he "questioned whether he could confidently locate a judge to work for who would be less corrupt than Defendant."

Defendant objects to the proposed discovery on relevance grounds; he argues that the primary issue in this case is not whether defendant was in fact "corrupt," but rather "why defendant fired plaintiff." According to defendant, "whether [Justice Beerman] was corrupt is irrelevant in determining what his motive was in firing plaintiff."

DISCUSSION

Rule 26(b)(l) of the Federal Rules of Civil Procedure states, in relevant part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at the trial if the information

sought appears *reasonably calculated to lead to the discovery of admissible evidence,* (emphasis added).

Relevance for purposes of this rule is an extremely liberal concept that "has been construed broadly to encompass any matter that bears on, or reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978). *See also Cox v. McClellan,* 174 F.R.D. 32, 34 (W.D.N.Y. 1997) ("[D]iscovery is to be considered relevant where there is *any possibility* that the information sought may be relevant to the subject matter of the action'") (quoting *United States v. International Business Machines Corp.,* 66 F.R.D. 215, 218 (S.D.N.Y. 1974) (emphasis in original)); *Ladson v. Ulltra East Parking Corp.,* 164 F.R.D. 376, 378 (S.D.N.Y. 1996) ("All that must be shown is that the discovery requested possibly might be relevant"). It is the burden of the objecting party--in this case, defendant--to demonstrate that requested discovery is irrelevant. *Kaplan v. Morrison,* No. 81 Civ. 3096 (RO), 1984 WL 733, at * 7 (S.D.N.Y. Aug. 6, 1984). *See also Obiajulu v. City of Rochester,* 166 F.R.D. 293, 295 (W.D.N.Y. 1996) ("The burden is on the party resisting discovery to clarify and explain precisely why its objections are proper given the broad and liberal construction of the discovery rules found in the Federal Rules of Civil Procedure"). A determination as to the relevance of requested discovery requires an analysis of the underlying claims.

As the Second Circuit has previously explained in this case, "[g]overnment employees have a limited right under the First Amendment to speak on matters of public concern." *Sheppard v. Beerman,* 94 F.3d 823, 827 (2d Cir. 1996) (citing *Connick v. Myers,* 461 U.S. 138, 146 (1983); *Frank v. Relin,* 1 F.3d 1317, 1328 (2d Cir.), *cert. denied,* 510 U.S. 1012 (1993)). To prove a *prima facie* case that he was fired in retaliation for exercising his First Amendment rights, plaintiff must show that: (1) his speech can be "'fairly characterized as . . . speech on a matter of public concern;'" and (2) the speech

was "`at least a substantial or motivating factor in the discharge.'" *Id.* (quoting *Frank*, 1 F.3d at 1328). Whether or not the speech at issue relates to a matter of public concern is a question of law. *Frank*, 1 F.3d at 1329.[1] However, the "motive behind Sheppard's firing in his retaliation claim is clearly a question of fact" on which plaintiff has the burden of proof. *Sheppard v. Beerman*, 18 F.3d 147, 151 (2d Cir. 1994). In order to prevail on that issue, "plaintiff must show '*particularized* evidence of direct or circumstantial facts' supporting his claim of unconstitutional motive." *Sheppard v. Beerman*, 94 F.3d at 828 (emphasis supplied) (quoting *Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995)). He must prove that "Beerman's actual motive for firing Sheppard was the content of his speech." *Id.*

If the plaintiff establishes both elements of a First Amendment retaliation claim, the public employer may nonetheless escape liability in either of two ways. It may prevail if it can show that it would have made the same decision in the absence of the protected conduct (see *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1977)), or if it

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[1]Whether speech is of public concern depends on the "content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). Speech that involves a matter of political, social or other concern to the community is of public concern. *Shands v. City of Kennett*, 993 F.2d 1337, 1343 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994). The form and context are examined to determine whether the public employee speaks as a concerned citizen informing the public that the government is not properly discharging its duties, or merely as an employee speaking about internal practices relevant only to fellow employees. *Cox v. Dardanelle Pub. Sch. Dist.*, 790 F.2d 668, 672 (8th Cir. 1986). Ordinarily, however, "allegations of corrupt practices by government officials" are considered to be "of the utmost public concern." *O'Donnell v. Yanchulis*, 875 F.2d 1059, 1061 (3d Cir. 1989). *See also Solomon v. Royal Oak Township*, 842 F.2d 862, 865 (6th Cir. 1988) ("speech disclosing public corruption is a matter of public interest and therefore deserves constitutional protection"); *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 46 (2d Cir. 1983) (exposure of corrupt practices obviously matter of public concern).

can show that the employee's speech had the potential to disrupt the work environment. *Frank v. Relin*, 1 F.3d at 1329 (citing *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)). Termination based on the potential for disruption does not violate the employee's First Amendment rights where:

> "(1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech."

Id. (quoting *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir.), *cert. denied*, 516 U.S. 862 (1995)).

The courts thus impose a balancing test: the employee's right to free speech is balanced against the public employer's interest in the effective operation of the workplace. *See Waters v. Churchill*, 511 U.S. 661, 668 (1994) (in order to be afforded protection, the employee's "interest in expressing herself . . . must not be outweighed by any injury the speech could cause to the 'interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees'") (quoting *Pickering v. Board of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)). *See also McEvoy v. Spencer*, 124 F.3d 92, 98 (2d Cir. 1997) (in balancing the respective interests, the trier must assess "the extent of the disruption caused by the employee's speech on workplace discipline, harmony among co-workers, working relationships, and the employee's job performance, and determine whether the disruption justifies the employer's attempt to stifle the employee's expressive activity"). In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Court added an additional factor to this balancing test:

> [S]ome attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will

> vary with the extent of authority and public accountability the employee's role entails.

Id. at 390. As a result, "the more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer." *McEvoy*, 124 F.3d at 103 (citation omitted).

This last factor will weigh heavily in the instant case for, as the Second Circuit has explicitly recognized, "the relationship between a judge and clerk is one based upon trust and faith. If a judge cannot believe that his clerk is competent, loyal, and discrete [sic], the working relationship between the two is not just injured, it is nonexistent." *Sheppard*, 94 F.3d at 829. *Cf. Fredonia Broadcasting Co. Inc. v. RCA Corp.*, 569 F.2d 251, 256 (5th Cir. 1978) ("A law clerk, by virtue of his position, is obviously privy to his judge's thoughts in a way that the parties cannot be"). However, as the Second Circuit also recently made clear, the confidential or policymaking status of an employee, while "very significant," does not "automatically permit the employer to take action against [the employee] in response to his exercise of free speech rights." *McEvoy*, 124 F.3d at 102. Indeed, the court acknowledged that "where the employee holds an extremely confidential or highly placed advisory position, it would be unlikely if the . . . balance were to be struck in his favor" because the "tremendous disruption to the public workplace likely to result from the critical speech of such an employee would in most cases outweigh any First Amendment interests possessed by that employee." *Id.* Nonetheless, the court held that the discharged employee's position in the employment hierarchy does not automatically tilt the balance in the employer's favor. *Id.*

Thus, a public employer may terminate an employee because of the potential for disruption, but not because of the employee's speech. *Id.* To meet its burden, however, the employer need only show *likely interference* with office efficiency, not actual disruption (*Jeffries*, 15 F.3d at 13 (citing

Waters, 511 U.S. at 673)), and a government employer's reasonable predictions of disruption are entitled to "substantial weight." *Waters*, 511 U.S. at 673; *see McCabe v. Sharrett*, 12 F.3d 1558, 1570 (11th Cir. 1994) ("public employer's interest will weigh heavily if the employee's exercise of the [First Amendment] right would compromise loyalty and confidentiality").

In *Blue*, the Second Circuit suggested that evidence of improper motive can include "expressions by the officials involved regarding their state of mind, circumstances suggesting in a substantial fashion that the plaintiff has been singled out, or the highly unusual nature of the actions taken." *Blue*, 72 F.3d at 1084. *See also Estate of Rosenbaum v. City of New York*, 975 F. Supp. 206, 223 (E.D.N.Y. 1997) (same); *Mascetta v. Miranda*, 957 F. Supp. 1346, 1354 (S.D.N.Y. 1997) (same). Here, plaintiff seeks discovery that he believes will unearth evidence of "corruption," apparently on the theory that such evidence would be circumstantially relevant in evaluating defendant's state of mind. According to plaintiff, if his accusations of judicial misconduct had an actual basis in fact, then a trier of fact is more likely to find that Justice Beerman fired him because of his speech.

In balancing the interests between an employee's right to free speech and an employer's need to prevent the disruption of official functions, some courts explicitly or implicitly have taken into account the veracity of an employee's accusations of misconduct or mismanagement. For instance, in *Johnsen v. Independent Sch. Dist. No. 3 of Tulsa County, Oklahoma*, 891 F.2d 1485 (10th Cir. 1989), a school nurse brought an action under 42 U.S.C. § 1983, alleging that the school district violated her First Amendment rights by refusing to renew her contract after she spoke out about the district's medication policy, which allowed nurses to administer prescription drugs to students with parental permission. Specifically, the plaintiff had complained at a public hearing and in several interviews with the press that other nurses were administering drugs to students "indiscriminately." *Id.* at 1489. Al-

though the school board later revised its medication policy, it declined to renew the plaintiff's contract on the ground that she had created a divisive atmosphere among the health services staff. *Id.*

At trial, the evidence proved that plaintiff's accusation concerning the "indiscriminate" dispensing of drugs was false and that the nurses had exercised their professional discretion appropriately in administering drugs to students. *Id* . After the jury found in favor of the plaintiff, the district court granted the defendant's motion for judgment notwithstanding the verdict, and the Tenth Circuit affirmed, holding that the school board had adequately proved that the plaintiff's speech was "needlessly disruptive." *Id.* at 1493. Central to the court's ruling was its conclusion that the plaintiff had acted recklessly by making false accusations, which resulted in "serious discord" between the plaintiff and the other nurses and "'interfere[d] with the regular operation of the enterprise.'" *Id.* (quoting *Rankin*, 483 U.S. at 388). *See also O'Donnell*, 875 F.2d at 1063 (plaintiff's interest in exposing corruption outweighed disruption to the workplace where undisputed facts supported plaintiff's claim that public officials had abused positions of power and attempted to coerce plaintiff into participating with them); *Frazier v. King*, 873 F.2d 820, 822, 826 (5th Cir.) (plaintiff's right to raise "well-founded" criticisms about unethical nursing practices at correctional facility outweighed facility's need to maintain discipline among its employees), *cert. denied*, 493 U.S. 977 (1989).

In addition, in *Pickering*, 391 U.S. 564 (1968), the plaintiff, a high school teacher, was fired for sending a letter to a local newspaper criticizing, among other things, the amount of money that the school board had allotted to athletic programs. The school board terminated his employment after finding that the letter contained false statements and was "detrimental to the efficient operation and administration of the schools of the district." *Id.* at 564. In balancing the plaintiff's right to comment on matters of public concern

against the need for orderly school administration, the Court accepted the board's finding that some of the statements in the plaintiff's letter were false. *Id.* at 570. It nevertheless held that the board was not justified in firing the plaintiff since there was no evidence that he made the false statements intentionally or recklessly or that the board had attempted to use the media to correct or rebut the errors. *Id.* at 572. Although the plaintiff made erroneous statements that were critical of his employer, the Court ultimately concluded that those statements did not impede the proper performance of his daily duties or interfere with the regular operation of the school, in part because the statements were not directed toward any person with whom the plaintiff would normally be in contact during the course of his daily work as a teacher. *Id.* at 569-70, 572-73. It therefore upheld the plaintiff's right to contribute to public debate. *Id.*[2] *See also Dahm v. Flynn*, 60 F.3d 253, 258 (7th Cir. 1994) (denying summary judgment on First Amendment retaliation claim where genuine issues of material fact existed on numerous issues, including whether plaintiff's testimony before state legislature was truthful); *Solomon v. Royal Oak Township*, 842 F.2d 862, 866-67 (6th Cir. 1988) (non-dispositive factors to be analyzed in determining whether public employee's speech is constitutionally protected are (1) "whether the disputed statements are false," (2) whether the employer attempted to correct the statements, (3) whether the employee intentionally or recklessly made false statements, and (4) whether the statements were directed to an individual with whom the plaintiff worked on a daily basis); *cf. Moore v. City of*

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[2]In *Pickering*, there was "no question of maintaining either discipline by immediate superiors or harmony among coworkers" because the plaintiff's employment relationship with the school board was "not the kind of close working relationship[] for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Pickering*, 391 U.S. at 570. Presumably, however, false accusations have a greater likelihood of undermining a working relationship that is of a more personal and intimate nature.

Wynnewood, 57 F.3d 924, 933 (10th Cir. 1995) ("We may assume that deliberately or recklessly false statements by public employees are either unprotected by the First Amendment or, at least, that such intentional falsity would weigh heavily against protection") (citing *Pickering*, 391 U.S. at 574); *O'Brien v. Town of Caledonia*, 748 F.2d 403, 407 n.2 (7th Cir. 1984) (public employee's accusations of graft and corruption need not be "correct" but are entitled to First Amendment protection so long as the speech does not contain false statements "knowingly or recklessly made") (citing *Pickering*, 391 U.S. at 574); *Santos v. Miami Region, U.S. Customs Serv.*, 642 F.2d 21, 25 (1st Cir. 1981) ("Criticisms made with malice or with knowledge that they contained falsehoods may not be protected").

Thus, the truth or falsity of plaintiff's accusations--although by no means dispositive--could plausibly have some bearing on a final determination as to whether the potential for disruption to the working environment outweighed the value of plaintiff's speech. If plaintiff can adduce evidence that his allegations of judicial "corruption" are true, or at least well-founded, then such evidence may tend to support his contention that the value of his speech outweighed any concerns about office efficiency or the need for a harmonious working relationship. By the same token, if plaintiff intentionally or recklessly made false statements, then his speech is not protected and his employer's interest in discharging him is likely to have outweighed his interest in speaking.[4] I

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[4]One could also argue that, if the allegations of "corruption" are true, then defendant had an incentive to suppress public disclosure. As the Second Circuit pointed out in *Giacalone v. Abrams*, 850 F.2d 79, 88 (2d Cir. 1988), however, an employee's contention that he or she was fired in response to a threat to "go public" with accusations of wrongdoing is not entitled to great evidentiary weight because "[t]ermination is far more likely to cause an employee to 'go public' than to silence him or her." Nonetheless, the court's present task is not to weigh the evidence, but only to determine whether the information sought is reasonably likely to lead to the discovery of admissible evidence.

therefore find that the discovery plaintiff seeks concerning allegations of corruption against defendant Beerman is relevant.

Nonetheless, courts have broad authority under the Federal Rules of Civil Procedure to regulate or preclude discovery (*see Lehigh Valley Indus., Inc. v. Birenbaum*, 527 F.2d 87, 93 (2d Cir.1975); *Hachette Distribution, Inc. v. Hudson County News Co.*, 136 F.R.D. 356, 358 (E.D.N.Y. 1991)), and may properly limit discovery even where the information sought is relevant. *Tisby v. Buffalo General Hosp.*, 157 F.R.D. 157, 170 (W.D.N.Y. 1994). Under Fed. R. Civ. P. 26(b)(2),

> [t]he frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issue at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

This rule directs a court to "examine the burdens potentially to be borne by the various parties if the contemplated discovery is performed, and to limit such if it determines that the burdens or expenses of the discovery outweigh the benefits." *Vorhes v. McMahon*, No. 95-CV-0398E(F), 1996 WL 484309, at *2 (W.D.N.Y. Aug. 2, 1996).

Moreover, much of the discovery plaintiff seeks relates to the internal processes of judicial decision making, which, although not protected by a specific privilege, are generally

entitled to strict confidentiality. *See Goetz v. Crosson*, 41 F.3d 800, 805 (2d Cir. 1994) ("The inner workings of administrative decision making processes are almost never subject to discovery ... [and] [c]learly, the inner workings of decision making by courts are kept in even greater confidence") (citations omitted), *cert. denied*, 516 U.S. 821 (1995); *Georgou v. Fritzshall*, 93 C 997, 1995 WL 248002, at *3 (N.D. 111. 1995)) ("There is considerable doubt. . . with respect to whether a judge may testify in a subsequent proceeding as to the mental processes which he performed in deciding a case") (citing *Fayerweather v. Ritch*, 195 U.S. 276 (1904)). Indeed, numerous courts have echoed this concern regarding the examination of the mental processes of a judge in a variety of circumstances. *See, e.g., United States v. Morgan*, 313 U.S. 409. 422 (1941) ("an examination of a judge would be destructive of judicial responsibility"); *In re Cook*, 49 F.3d 263, 265-66 (7th Cir. 1995) ("Inquiry beneath the surface of a judge's opinion is forbidden"); *Washington v. Strickland*, 693 F.2d 1243, 1263 (5th Cir. 1982) ("It is a firmly established rule in our jurisprudence that a judge may not be asked to testify about his mental processes in reaching a judicial decision"), *rev'd on other grounds*, 466 U.S. 668 (1984); *United States v. Crouch*, 566 F.2d 1311,1316 (5th Cir. 1978) ("Just as courts will not review the motives of a legislature in enacting a law, . . . this court will not review the mental processes of a trial judge") (citations omitted); *Holliday v. Kline*, 172 B.R. 279, 282 (Bankr. W.D. Mo.) ("case law holds that only under extraordinary circumstances can a judge be required to testify concerning any actions taken in his judicial capacity") (citing *In re Thompson*, 77 B.R. 113 (N.D. Ohio 1987)), *rev'd in part on other grounds*, 174 B.R. 525, 527 n. 6 (W.D. Mo. 1994); *Morrison v. Kimmelman*, 650 F. Supp. 801, 805 (D.N.J. 1986) ("it is a firmly established rule in our jurisprudence that a judge may not be asked to testify about his mental processes in reaching a judicial decision"); *Feller v. Board of Educ. of State of Connecticut*, 583 F. Supp. 1526, 1528 (D. Conn. 1984) (it is not the function of a court to probe the mental process-

es of an administrative adjudicator); *Brownko Int'l, Inc. v. Ogden Steel Co.*, 585 F. Supp. 1432, 1437 (S.D.N.Y. 1983) ("it is simply not appropriate to receive . . . testimony from quasi-judicial officers"); *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683, 696 (N.D. Ga.1983) (judge's affidavit testimony concerning his mental impressions of a party to a trial not admissible evidence); *Glenn v. Aiken*, 569 N.E.2d 783, 786 (Mass. 1991) ("Probing the mental processes of a trial judge, that are not apparent on the record of the trial proceeding, is not permissible"); *Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor*, 848 P.2d 1086, 1092 (N.M. App. Ct. 1993) ("Respect for the finality of judgments makes resort to judicial affidavits particularly inappropriate when the purpose is to 'state the secret and unexpressed reasons which actuated' a judgment") (quoting *Day v. Crowley*, 172 N.E.2d 251, 253 (1961)), *cert. denied*, 846 P.2d 1069 (N.M. 1993): *People v. Lyle*, 160 N.E. 742, 743 (Ill. 1928) (the actions of a court can be shown only by the record kept by the clerk and cannot be impeached by the recollection of the judge).[5]

Finally, the court is cognizant that although the standard of relevancy for discovery purposes is a liberal one, "it has

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[5]To be sure, there is no rule absolutely exempting a judge from the normal obligation to respond as a witness when he or she has information material to a civil or criminal proceeding. *Dennis v. Sparks*, 449 U.S. 24, 31 (1980). However, obtaining discovery from a judge who witnessed certain events is distinguishable from an attempt to obtain the mental impressions of the court in the decision making process. Generally, discovery that extends to the internal operations or functioning of the judicial process is impermissible, as it is recognized to be "in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being [held accountable] should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption." *Id.* (citations omitted). *See also In re Randall*, 640 F.2d 898, 902-03 (8th Cir.), *cert. denied*, 454 U.S. 880 (1981). Much of the discovery plaintiff seeks would explore the merits of judicial decisions in specific cases and expose those decisions to public scrutiny; such discovery therefore falls within the latter category.

long been the rule in this Circuit that 'the parties should not be permitted to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.'" *Lemanik, S.A. v. McKinley Allsopp, Inc.*, 125 F.R.D 602, 608 (S.D.N.Y. 1989) (quoting *In re Surety Ass'n of America*, 388 F.2d 412, 414 (2d Cir. 1967)). In light of all of these principles, the following is the court's order on the permissible scope of discovery on the issue of "corruption":

1. Plaintiff may take discovery from assistant district attorneys and administrative court personnel who were directly involved with or are otherwise likely to have personal information about *People v. Mason and Williams* and *People v. Babarchich*. Before noticing such discovery, plaintiff must submit a list containing the names of such individuals to defendant's counsel, along with a description of each person's purported connection with or knowledge concerning either case. Discovery of such persons shall be limited to their knowledge of *People v. Mason and Williams* and *People v. Babarcich*, and of Justice Beerman's rulings in those cases.

2. Plaintiff may also take discovery from assistant district attorneys or administrative court personnel who are likely to have *personal knowledge* of alleged instances of corruption in any other individual case *about which plaintiff had specific knowledge in December 1990*, as such information is conceivably relevant to defendant's state of mind concerning plaintiff's accusations. Plaintiff may not ask such witnesses for information about instances of corruption generally or about anything that took place before or after the dates of plaintiff's employment. Nor may plaintiff ask questions about the activities, decisions, or motivations of any judge other than Justice Beerman, as such questions are not likely to shed light on the primary issues in this case and the potential benefits of such discovery do not outweigh the likely burdens on non-parties. Such discovery is limited to five (5) witnesses total, with leave to request permission to

take discovery from additional witnesses after a proper showing. Before noticing such discovery, plaintiff must submit to defendant's counsel a list containing the names of the five witnesses, along with a description of each person's purported knowledge concerning specific instances of alleged corruption.

3. Plaintiff may not depose or otherwise seek discovery at this time from any former or current non-party judge or law clerk, as the potential burden on the judiciary far outweighs any value such discovery might have on tangential issues unrelated to the defendant's motivation for terminating plaintiff's employment, and plaintiff has thus far failed to make a showing that such persons are likely to have factual information concerning Justice Beerman's alleged corrupt acts. Plaintiff may renew his request for such discovery after completion of all other remaining discovery in this case upon a proper showing of relevance.

All outstanding discovery is to be completed within 120 days of the date of entry of this order. No extension of this deadline will be granted absent a demonstration of good cause.

SO ORDERED.

Dated: Brooklyn, New York
March 31, 1998

ROBERT M. LEVY
United States Magistrate Judge

MAGISTRATE JUDGE'S JUNE 23, 1998
DENIAL OF REARGUMENT ON DISCOVERY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIAN SHEPPARD,
Plaintiff,

-against-

LEON BEERMAN,
Defendant.

MEMORANDUM
AND ORDER
95-CV-4832 (ILG)(RML)

LEVY, United States Magistrate Judge:

Pending before the court is plaintiff's motion, dated April 17, 1998, for reconsideration, reargument and clarification of this court's March 31, 1998 decision granting in part and denying in part plaintiff's motion to compel discovery ("the decision"). After the motion was fully briefed, the court held a conference on June 12, 1998 at which it reviewed the parties' arguments, discussed the decision and attempted to set a schedule for the expeditious conclusion of discovery.

For the reasons set forth in the decision and in defendant's opposition, plaintiff's motion is denied. As the Second Circuit has instructed, the sole remaining issue in this case is one of motive: did the defendant terminate plaintiff in retaliation for the exercise of constitutionally protected speech and, if so, would he nevertheless have fired plaintiff for legitimate, non-retaliatory reasons? Plaintiff, however, seeks to use the discovery process to delve into allegations of corruption against both the defendant and numerous non-defendants, including judges, law clerks and court personnel.[1] At the June 12 conference, plaintiff informed the court

[1]For example, plaintiff focuses considerable attention on the need for discovery concerning the conduct of New York State Supreme Court Justice Alfred Lerner, whose "massive corruption," plaintiff insists, is

that he would seek to depose between seven and ten non-party judges, as many as four law clerks and up to seven court clerks and administrative personnel in what he termed the first two tiers of discovery. Plaintiff advised that a substantial portion of the questioning would address the corruption of non-parties.[2]

Although the standard of relevancy under the Federal Rules of Civil Procedure is generous, plaintiff has failed to demonstrate that the broad discovery he seeks concerning allegations of corruption, particularly with respect to the corruption of non-parties, is relevant to the issues in this case. Nor has he made a specific showing that the non-party judges and law clerks he seeks to depose are likely to have personal knowledge of acts of corruption that bear on defendant's motive for firing plaintiff.

In seeking reconsideration, plaintiff has adduced no new evidence or authority that would justify altering the conclusions reached in the March 31, 1998 decision. Plaintiff has yet to demonstrate that the witnesses he seeks to depose are likely to have factual information relevant to defendant's motivation for discharging him or that the value of the information he is likely to obtain outweighs the substantial burdens. In fact, the wide-ranging discovery that plaintiff sought at the June 12 conference further confirms the need for reasonable limits on the scope and number of depositions into alleged acts of corruption by people who are not parties to this litigation.

Rule 26(b)(2) charges the federal courts with the responsibility to limit discovery where "the burden or expense of the

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"relevant to demonstrate his motive for ordering Plaintiff ejected and barred from the courthouse. . . ." Plaintiff's Memorandum of Law In Support of Motion for Reconsideration, Reargument, and Clarification, dated April 17, 1998, p.7. Justice Lerner is not a defendant in this action.

[2]Plaintiff suggested that several of the depositions may prove unnecessary, depending on the results of his first tier of depositions.

proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[3] After carefully weighing these factors and re-evaluating the March 31, 1998 decision in light of the arguments raised in plaintiff's motion for reconsideration, the court concludes that the burdens of allowing plaintiff unfettered license to depose judges, law clerks, court personnel and assistant district attorneys in his quest to develop evidence of judicial corruption that goes beyond his allegations against this defendant clearly outweigh any potential benefit that plaintiff has articulated thus far. The motion for reconsideration is denied.

Nonetheless, as the decision makes clear and the court reiterated at the June 12 conference, plaintiff is free to renew his request for additional discovery at the completion of all other discovery in this case and upon a proper showing that the additional witnesses are likely to have information relevant to the issues in this lawsuit.

SO ORDERED.

Dated: Brooklyn, New York
June 23, 1998

ROBERT M. LEVY
United States Magistrate Judge

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[3]Rule 26(b)(2) further authorizes the court to "act on its own initiative after reasonable notice. . . ." Notwithstanding, plaintiff contends that the court erred in raising the issue of the scope of discovery *sua sponte*. There can be no dispute that plaintiff had sufficient notice of the court's concerns that the burdens of the broad discovery he proposed would outweigh any value such discovery might have on the issues related to defendant's motivation for terminating plaintiff. The matter was first discussed at a pre-trial conference, after which plaintiff was afforded the opportunity to brief the matter fully before a decision was issued.

DISTRICT COURT'S JULY 31, 1998
AFFIRMANCE OF DISCOVERY ORDERS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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BRIAN SHEPPARD,
Plaintiff,

-against- ORDER

LEON BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York, 91 Cv. 1349

Defendant.
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GLASSER, United States District Judge:

Plaintiff Brian Sheppard has moved, pursuant to Fed. R. Civ. Proc. 72(a), for an order modifying or setting aside Magistrate Judge Robert M. Levy's Memorandum and Order dated March 31, 1998, which sets forth the scope of discovery permissible in this case, and Magistrate Judge Levy's denial of plaintiffs motion for reconsideration of that Order. This court has reviewed *de novo* the submissions of the parties and has, in light of those submissions, carefully considered the decision of March 31st, 1998 in which Magistrate Judge Levy fixed the permissible scope of discovery that plaintiff can pursue and from which this appeal has been filed and the Order of Magistrate Judge Levy dated July 17, 1998, which is endorsed on plaintiff's letter of July 7, 1998, by which Magistrate Judge Levy re-affirms his decision of March 31st and is consolidated therewith. That consideration drives the court to conclude that Magistrate Judge Levy's determinations are neither clearly erroneous nor contrary to law and they are hereby affirmed.

JULY 1998 DISCOVERY AFFIRMANCE

Furthermore, plaintiff's objection to a ruling made by Magistrate Judge Levy regarding a question posed to plaintiff at his deposition and referred to on the record of this morning was before this court by consent of the defendant. After careful consideration, this court finds that this ruling was neither clearly erroneous nor contrary to law.

SO ORDERED.

Dated: July 31, 1998
Brooklyn, New York

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I. Leo Glasser, U.S.D.J.

MAGISTRATE JUDGE'S MAY 16, 2000
ORDER DENYING RENEWED MOTION FOR
DISCOVERY OF MISCONDUCT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIAN SHEPPARD,
Plaintiff,

-against-

LEON BEERMAN,
Defendant.

MEMORANDUM
AND ORDER
91-CV-1349 (ILG)(RML)

APPEARANCES:

Brian Sheppard, Esq.
516 N. 9th Place
New Hyde Park, NY 11040
Plaintiff *Pro Se*

ELIOT SPITZER
Attorney General of the
State of New York
120 Broadway
New York, NY 10271
BY: Michael B. Siller, Esq.
Counsel for Defendant

LEVY, United States Magistrate Judge:

By Memorandum and Order dated March 31, 1998, this court granted in part and denied in part plaintiff's motion to compel discovery on the issue of defendant Justice Leon Beerman's alleged "corruption." That Memorandum and Order, familiarity with which is assumed, gave plaintiff permission to take discovery from (1) Assistant District

Attorneys and court personnel who were directly involved with or were otherwise likely to have personal information about the cases of *People v. Mason and Williams* and *People v. Babarcich*, referenced in the complaint, and (2) Assistant District Attorneys and court personnel who were likely to have personal knowledge of alleged instances of defendant's corruption in any other individual case about which plaintiff had specific knowledge in December 1990, limited to five witnesses. The Memorandum and Order denied plaintiff permission to take discovery concerning the activities, decisions, or motivations of judges other than defendant, but gave plaintiff leave to request additional depositions after the completion of all other discovery "upon a proper showing of relevance." (Memorandum and Order dated March 31, 1998, at 16-17.) Accordingly, plaintiff now seeks leave to redepose Judge Alfred Lerner, former Judge Pearl Appelman, and Assistant District Attorneys Jack Warsawsky and Kenneth Appelbaum, and to depose for the first time Judges Charles Thomas, Arthur Cooperman, and Steven Knopf, law clerk Frank Incantalupo, former Queens County District Attorney John Santucci, former "District Attorney counsel" Spiros Tsimbinos, and "District Attorney supervisor" Robert Alexander.

Plaintiff's primary argument is that he needs broader discovery in order to corroborate his claim that he decided not to report or disclose Justice Beerman's allegedly corrupt doings or seek another position within the state judiciary because (a) he believed that such a report would have no effect "other than hurting [plaintiff]," (b) defendant "appeared to be less corrupt than many of the other judges, so that it seemed somewhat unfair for Defendant to be singled out," and (c) he believed that it "would be difficult to locate a judge in the system who did not engage in misconduct." (Pl.'s Mem., dated Feb. 18, 2000, at 7.) According to plaintiff, "it would be grossly unfair for Plaintiff to be questioned at trial about his failure to blow the whistle or look for another job more aggressively--where Plaintiff's answer will cite the

wide-scale corruption among judges and prosecutors apparently tolerated by the system--if Plaintiff is not afforded a fair opportunity to obtain testimony supporting his position that he was exposed to such wide-scale corruption." (*Id.*)[1]

This argument is unavailing for at least two reasons. First, the issue of why plaintiff failed to "blow the whistle" or search for another job within the judiciary is tangential, at best, to the central issue of fact in this case, *i.e.,* defendant's motivation for terminating plaintiff's employment and whether his intent was to punish plaintiff for speaking on a matter of public concern or to avoid disruption to the effective functioning of his chambers. (See Memorandum and Order dated March 31, 1998, at 5-8.) Second, even if *plaintiff's* state of mind were relevant, only the knowledge or information he had *at that time* would support his claim that he acted reasonably under the circumstances. In other words, even if plaintiff were to uncover evidence of widespread judicial corruption now, such evidence would not prove what plaintiff knew or reasonably believed in December 1990, and such after-the-fact discovery of corruption

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[1]In a 30 page memorandum of law in support of his request, plaintiff offers 23 reasons why evidence of what he terms "corruption" is relevant to his claims and details "areas of particular inquiry" that he urges require additional depositions of non-parties. These areas include Judge Alfred Lerner's alleged "practice . . . of imposing settlements on the parties in cases where the City of New York was the defendant" (PL's Mem. at 29); allegations of *ex parte* communications between Queens County prosecutors and judges and their law clerks; defendant's alleged concern that his jury trial conviction rate was too low and his efforts to rewrite jury charges in certain cases in which he wanted a conviction; and allegations of defendant's bias and misconduct in the criminal case of *People v. Babarcich,* including defendant's alleged efforts to have the case assigned to him, defendant's alleged expressions of anger toward Babarcich's father and attorney (supported by Babarcich's father's deposition testimony that defendant "avoided eye contact with the Babarcich family" (Pl.'s Mem. at 16)), and the meaning of a question by Babarcich's counsel to plaintiff after plaintiff's termination as to whether plaintiff had "the Plague." (See Pl.'s Mem. at 19-22.)

would not provide a justification for plaintiff's actions, or inactions, nearly ten years ago.

At any rate, plaintiff has been given wide latitude with regard to discovery in this case and has had more than sufficient opportunity to seek evidence to support his claims. Plaintiff has taken thirty-one (31) depositions in this case, including seven depositions of active or retired judges, ten depositions of active or retired Assistant District Attorneys and eight depositions of law secretaries or courthouse staff members. (See Affidavit of Michael B. Siller sworn to Feb. 29, 2000, Ex. A.) None of that discovery, to the court's knowledge, has unearthed credible evidence of corruption or serious wrongdoing on the part of Justice Beerman, and nothing in plaintiff's 30-page submission has convinced this court that additional depositions would likely lead to the discovery of admissible evidence on this point.

As explained in my previous discovery rulings, Rule 26(b)(l) of the Federal Rules of Civil Procedure allows parties to obtain discovery regarding any non-privileged matter so long as the information sought appears "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(l). Relevance for purposes of this rule is a liberal concept that "has been construed broadly to encompass any matter that bears on, or reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). *See also Cox v. McClellan*, 174 F.R.D. 32, 34 (W.D.N.Y. 1997) ("[D]iscovery is to be considered relevant where there is *any possibility* that the information sought may be relevant to the subject matter of the action'") (quoting *United States v International Business Machines Corp.*, 66 F.R.D. 215, 218 (S.D.N.Y. 1974) (emphasis in original)).

On the other hand, Fed. R. Civ. P. 26(b)(2) authorizes the court to limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the

litigation, and the importance of the proposed discovery in resolving the issues." The court's responsibility to limit discovery is particularly great where the discovery is sought from non-parties. *See United States v. American Soc'y of Composers*, No. CIV. 13-95, 1996 WL 157523, at *2 (S.D.N.Y. Apr. 3, 1996); *Gumowitz v. First Fed. Savings and Loan Ass'n of Roanoke*, No. 90 Civ. 8083, 1994 WL 683431, at *1 (S.D.N.Y. Dec. 6, 1994). Here, the discovery plaintiff seeks is unlikely to lead to the discovery of admissible evidence and, at any rate, concerns matters that have little bearing on the core issues of fact in this case. Moreover, even if the discovery plaintiff seeks were reasonably calculated to lead to the discovery of admissible evidence, the burdens on these non-party witnesses of attending depositions would far outweigh any potential benefit to plaintiff's case. Plaintiff's motion for further discovery is therefore denied.

As defendant has indicated his intention to file a motion for summary judgment, the parties are directed to confer and to submit a joint proposed briefing schedule to my chambers on or before May 31, 2000.

SO ORDERED.

Dated: Brooklyn, New York
May 16, 2000

ROBERT M. LEVY
United States Magistrate Judge

DISTRICT COURT'S JULY 17, 2000
AFFIRMANCE OF DISCOVERY ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

BRIAN SHEPPARD,

Plaintiff,

-against- MEMORANDUM AND ORDER

LEON BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York, 91-CV-1349(ILG)(RML)

Defendant.
----------x

GLASSER, United States District Judge:

Plaintiff appeals a written order of Magistrate Judge Levy, dated May 16, 2000, pursuant to Rule 72 of the Federal Rules of Civil Procedure. In that order, Judge Levy denied plaintiff's application to redepose Judge Alfred Lerner, former Judge Pearl Appelman, and Assistant District Attorneys Jack Warsawsky and Kenneth Appelbaum, and to depose for the first time Judges Charles Thomas, Arthur Cooperman, and Steven Knopf, law clerk Frank Incantalupo, former Queens County District Attorney John Santucci, former "District Attorney counsel" Spiros Tsimbinos, and "District Attorney supervisor" Robert Alexander. *See, Sheppard v. Beerman*, No. 91-CV-1349, Mem. and Order (E.D.N.Y. May 16, 2000) (RML) (hereinafter, "May 16 Order").

Plaintiff made his application in furtherance of his effort to "seek additional discovery on corruption." Pl. Mem., May

29, 2000, at 1. Plaintiff reasons that such discovery is relevant to the issues remaining in this case because "it would be grossly unfair for Plaintiff to be questioned at trial about his failure to blow the whistle or look for another job more aggressively where Plaintiff's answer will cite the wide-scale corruption among judges and prosecutors apparently tolerated by the system--if Plaintiff is not afforded a fair opportunity to obtain testimony supporting his position that he was exposed to such wide-scale corruption." Pl. Mem., Feb. 18, 2000, at 7.

In rejecting this argument, Judge Levy cited two grounds. First, the depositions plaintiff seeks, and the issues he proposes thereby to explore, are related tangentially, at best, to the central factual issue in this case: namely, the "defendant's motivation for terminating plaintiff's employment, and whether his intent was to punish plaintiff for speaking on a matter of public concern or to avoid disruption to the effective functioning of his chambers." May 16 Order at 3. Second, "even if *plaintiff's* state of mind were relevant, only the knowledge or information he had *at that time* would support his claim that he acted reasonably under the circumstances." *Id.* (italics in original). Accordingly, Judge Levy concluded that plaintiff's application to trawl indiscriminately for evidence of "corruption" in the Queens County judiciary was not properly sustained by a showing of relevance to the issues in his lawsuit.

Judge Levy also pointed out that the plaintiff has already been accorded wide latitude to seek evidence to support his claim that Justice Beerman's corruption, or his knowledge of corruption, underlay plaintiff's firing. Specifically, Judge Levy observed that plaintiff has already taken 31 depositions, including depositions of the defendant, his two sons, three retired NYS Supreme Court Justices, four active NYS Supreme Court Justices, six active and four former Queens County ADA's, two active law secretaries to NYS Supreme Court Justices, one active administrative assistant, the former and present Clerk of the Court for Queens County, another

active Court clerk, three active Court officers, the attorney for a defendant in a case before Justice Beerman at the time of plaintiff's tenure, and that defendant's father. Judge Levy concluded that "[n]one of that discovery, to the court's knowledge, has unearthed credible evidence of corruption or serious wrongdoing on the part of Justice Beerman, and nothing in plaintiff's 30-page submission has convinced this court that additional depositions would likely lead to the discovery of admissible evidence on this point." May 16 Order at 4.

This Court considers objections to rulings by the assigned Magistrate Judge on "nondispositive" pretrial matters, and is obliged to "modify or set aside any portion of the magistrate judge's order[s] found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); *see also* 28 U.S.C. § 636(b)(l)(A) ("A judge of the [district] court may reconsider any [nondispositive] pretrial matter . . . where it has been shown that the magistrate's order is clearly erroneous or contrary to law."). The ruling here at issue pertains to a nondispositive pretrial discovery dispute, and so may be modified or set aside only upon a showing of clear error. *See Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990) ("Matters concerning discovery generally are considered 'nondispositive' of the litigation.").

A party seeking to overturn a ruling under the clear error standard bears a "heavy burden." *Com-Tech Assocs. v. Computer Assocs. Int'l. Inc.*, 753 F. Supp. 1078, 1099 (E.D. N.Y 1990), *aff'd*, 938 F.2d 1574 (2d Cir. 1991). The Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In applying this standard in review of a magistrate judge's rulings on discovery disputes, courts customarily accord substantial deference to the rulings, and overturn only upon evidence of an abuse of discretion. *Nikkal Indus., Ltd. v.*

JULY 2000 DISCOVERY AFFIRMANCE

Salton, Inc., 689 F. Supp. 187, 189 (S.D.N.Y. 1988).

Having reviewed Judge Levy's order of May 16 in light of these standards, I find nothing in it that can fairly be characterized as either clearly erroneous or contrary to law. Therefore, plaintiff's motion to modify or set aside that order, in whole or in part, is denied.

SO ORDERED.

Dated: July 17, 2000
Brooklyn, New York

I. Leo Glasser, U.S.D.J.

DENIAL OF REHEARING ON *SHEPPARD III*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 11th day of March two thousand three.

BRIAN SHEPPARD,

Plaintiff-Appellant,

Docket No. 02-7292

v.

LEON BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,

Defendant-Appellee.

A petitioner for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Brian Sheppard.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

SHEPPARD III REHEARING DENIAL

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: _____
Arthur M. Heller,
Administrative Attorney

COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIAN SHEPPARD,	:	CIVIL ACTION
Plaintiff,	:	NO.
vs.	:	
LEON BEERMAN, as an individual	:	COMPLAINT
and in his official capacity	:	
as Justice of the Supreme Court	:	AND JURY
of the State of New York,	:	
Defendant.	:	TRIAL DEMAND

A. INTRODUCTORY STATEMENT

1. This is a civil action for money damages and declaratory and injunctive relief arising from defendant's (a) retaliation for plaintiff's protesting, and considering to expose, judicial misconduct, and (b) obstruction of his attempts to air the misconduct and vindicate his rights and those of persons prejudiced by it.

B. JURISDICTION

2. The Court has jurisdiction pursuant to Title 28, sections 1331, 1343, 1367, 2201, and 2202, as well as Title 42, section 1983, of the United States Code.

C. THE PARTIES

3. Plaintiff is an attorney admitted to practice in New York and this Court. He worked as defendant's law clerk from October of 1986 until December of 1990. He was a resident of Nassau County and a citizen of the United States during that period, and continues to be so today.

4. Defendant was a justice of the Supreme Court of the State of New York for the County of Queens, and a resident of Queens County, in October of 1986, and has continued those statuses to this day. He is being sued in both his individual and official capacities, except that monetary damages are sought from him only in his individual capacity.

5. At all times mentioned in this complaint, defendant was acting under color of state law--that is, under color of the Constitution, statutes, laws, rules, regulations, customs, and usages of the State of New York, the New York State Unified Court System, and its various subdivisions.

D. PLAINTIFF'S TENURE AS DEFENDANT'S LAW CLERK PRIOR TO DECEMBER OF 1990

6. Throughout plaintiff's tenure as defendant's law clerk, defendant expressed strong approval of plaintiff's work. Plaintiff was also held in high regard by the other court employees and the Queens legal community.

7. During his tenure, plaintiff was exposed to many instances of judicial conduct clearly and strongly proscribed by the codes and rules applicable to the New York judiciary. He attempted, with only partial success, to dissuade defendant from engaging in such misconduct.

E. THE ARGUMENT BETWEEN THE PARTIES ON DECEMBER 7, 1990

8. Among the cases on defendant's trial calendar during the first week of December of 1990 were *People v. Howard "Pappy" Mason & Chris "Jughead" Williams* and *People v. Steven Babarcich.*

9. *Babarcich* was a vehicular manslaughter case which defendant arranged to have assigned to him, in order to be able to take revenge against Babarcich for being arrested on the manslaughter charge during the stay of sentences he had previously imposed on Babarcich. He frequently told plaintiff that he intended to do everything he could to ensure Babarcich's conviction on the new case. He followed through on that assurance, and the trial began the first week of December.

10. *Mason/ Williams* was a murder case in relation to which there were *ex parte* communications. On December 6, defendant directed plaintiff to draft a decision denying Williams's pending speedy trial motion without a hearing, regardless of the motion's merits, so that Williams would stand trial, and at a time advantageous to the prosecution.

11. The following morning, December 7, plaintiff refused to follow defendant's direction, saying that he would not take part in the "railroading" of Williams. Defendant responded that although plaintiff was not being discharged, he should seek other employment if he felt that way.

12. Plaintiff declined, saying that *he* was not the one who had acted improperly. Defendant denied any impropriety, until plaintiff reminded him of his misconduct in *Babarcich* and other cases and disclosed plaintiff's having taken notes of courthouse events.

13. Defendant expressed concern as to whether and when plaintiff would make his notes public. He responded that he was not certain, but that he would no longer have a duty of loyalty to defendant if defendant continued to pressure him into taking part in misconduct.

14. While neither party became physically threatening or lost control of himself, voices were raised and epithets exchanged. Defendant called plaintiff "disturbed" and "disloyal," while plaintiff said that defendant was "corrupt" and a "son-of-a-bitch."

15. Plaintiff immediately apologized for the latter characterization, after which defendant said nothing about it. But defendant's adamant protestations, that his intermittent wrongdoing did not render him "corrupt," failed to persuade plaintiff.

16. The argument ended with no resolution. Plaintiff worked the remainder of the day without incident. After the intervening weekend and his illness on December 10, he returned to work on the 11th.

F. PLAINTIFF'S DISCHARGE AND PHYSICAL REMOVAL, AND THE SEARCHES AND SEIZURES OF HIS PROPERTY.

17. Plaintiff's information, obtained from judges, clerks, law clerks, other court personnel, members of the media, and other sources, causes him to believe the allegations contained in paragraphs 18 through 20, 23, and 30 through 33, below. He needs discovery to obtain knowledge of the truth or falsity of these allegations, knowledge which defendant possesses as to virtually all of them.

18. Prior to plaintiff's return on December 11, defendant embarked on a course of conduct, set forth below, designed to: (a) examine or seize plaintiff's notes on courthouse events and other material in his office relating to judicial misconduct, including what he might bring to work on the 11th; (b) punish him for his objecting to, or considering to expose, such misconduct; and/or (c) impede his ability to air the misconduct or vindicate his own rights or those of persons prejudiced by it, by [1] discrediting or intimidating him, [2] discouraging others from assisting him, and/or [3] restricting his access to information in the courthouse.

19. Before plaintiff's return on the 11th, defendant searched, or caused to be searched, plaintiff's private office in defendant's chambers. Although the notes sought were not found, something was discovered which caused defendant to fear that plaintiff intended to report on judicial misconduct on December 12.

20. On or shortly before the 11th, defendant made statements regarding plaintiff to the administrative judge and the chief clerk of the Supreme Court for Queens County. Pursuant to defendant's request, they directed that court officers take the actions against plaintiff described in paragraphs 22 and 23, below.

21. Defendant knew that plaintiff had done nothing to warrant the taking of such actions.

22. Plaintiff returned to work on the 11th at 9:15 AM. At 11:10 AM, by which time defendant had not yet appeared in his courtroom or chambers, a principal court officer (a) entered the chambers accompanied by two other court officers; (b) advised plaintiff that defendant had discharged him effective the end of the previous day, December 10; and (c) directed plaintiff [1] to immediately leave the courthouse in the company of the other officers, without first being allowed to gather his belongings from his office, and [2] not to return for his property except in the company of the officers at a later time. Plaintiff was then escorted out of the courthouse by the two officers.

23. Other court officers guarding the entrances to the courthouse were directed to prevent plaintiff's reentry.

24. After plaintiff's removal, defendant again searched, or caused to be searched, his office, including the file cabinets and desk drawers. A box of his personal file cards was seized and removed to defendant's private office and examined. Almost all of his remaining belongings were placed in a box and put aside.

25. When plaintiff returned to his office on December 13 in the company of court officers, he protested the seizure of his file cards. A court employee retrieved them for him from defendant's office.

26. Plaintiff attempted to remove personal files from his file cabinet, but was prevented from doing so by a different court employee, acting at defendant's direction. The employee advised him that defendant would determine at a later time whether he could take the files.

27. After defendant examined, or caused to be examined, those files, plaintiff was advised on December 17 that he could have them.

28. Although files were returned to plaintiff on December 21, he is unable to ascertain, without discovery, whether defendant has retained some of his files or other of his property.

29. It is neither the policy nor custom of defendant or other New York judges (a) to search their law clerk's office or seize any objects therefrom, except to the extent that materials belonging to the court or the judge, located in plain view or in file cabinets, might be briefly sought and removed as needed for legitimate court purposes; or (b) when firing a law clerk, to physically remove him from the courthouse or deny him the opportunity to gather his belongings before others intrude upon his office and property therein.

G. DEFENDANT'S FALSE STATEMENTS ABOUT PLAINTIFF

30. Beginning on or shortly after December 7, defendant made false and defamatory statements to others, that the reasons for plaintiff's abrupt discharge and physical removal were his having called defendant a "son-of-a-bitch" and having completely lost control of himself. These statements, which did not mention defendant's misconduct, were thereafter repeated by those who heard them to other persons.

31. Without discovery, plaintiff cannot specify the exact words, dates, locations, or parties involved in defendant's false statements and their repetitions. Plaintiff's information does indicate, at the very least, that such statements were (a) made by defendant to judges, clerks, law clerks, and other court employees, in the Queens courthouses on or about December 11 and at a Brandeis Association gathering on or about December 12, and then (b) circulated among other court personnel.

32. As a result of the actions taken against plaintiff on December 11 at defendant's request, as well as defendant's false statements, false and defamatory rumors spread in and around the Queens courthouses about the reasons for plaintiff's abrupt discharge and physical removal, including that he had been arrested, had assaulted defendant, and was otherwise a criminal.

33. Defendant has continued since December of 1990 to make false statements about plaintiff's discharge and removal, and intends to do so in the future.

H. DEFENDANT'S INTERFERENCE WITH PLAINTIFF'S COURTHOUSE ACTIVITIES IN 1991

34. On January 18, 1991, defendant directed that if plaintiff wished to examine court files in cases pending before defendant, he would have to do so outside the courtroom. This caused him to miss part of defendant's calendar call on that day. He had never heard of defendant's making such a direction before.

35. On January 28, defendant told the attorney for Babarcich (whose December, 1990, trial had since been aborted) on the record that it would be improper for the attorney to speak to plaintiff about anything he learned as defendant's law clerk. The attorney has since refused to speak to him, citing defendant's admonition.

36. On January 30, while plaintiff was in defendant's courtroom waiting for the *Williams* case (which had since been severed from *Mason*) to be called, defendant suspended his calendar call to field questions from persons in the audience. He gratuitously stated that those in the audience who were not parties to cases "should not be involved" in them.

37. On February 11, plaintiff went in and out of defendant's courtroom during the calendar call, looking for Williams's attorney. Defendant stated on the record that plaintiff was using the courtroom like a "revolving door." He attempted to respond, but defendant told him to sit down and not speak. He had often seen attorneys come in and out of defendant's courtroom while proceedings were taking place, but none of them was subjected to the rude treatment he received. He has not returned to defendant's courtroom since that day.

I. CAUSES OF ACTION

38. Defendant's acts detailed above have violated and/or threaten to violate the following rights of plaintiff as guaranteed by the United States Constitution, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, and made actionable under Title 42, section 1983 of the United States Code: (a) the First Amendment rights [1] of freedom of speech, [2] to petition for redress of grievances, and [3] of access to criminal proceedings and documents; and (b) the Fourth Amendment right to be free from unreasonable searches and seizures.

39. Defendant's acts have also deprived, and/or threaten to deprive, plaintiff of his right to be free from the following torts under New York law and subject to this Court's pendent jurisdiction: false imprisonment, trespass, conversion, defamation, intentional infliction of emotional distress, *prima facie tort*, false words causing special damages, interference with prospective contractual relations, and

wrongful termination of an attorney court employee on grounds violating public policy.

J. SPECIAL DAMAGES

40. As a result of defendant's acts, plaintiff has sustained, and anticipates sustaining in the future, the following special damages not otherwise previously mentioned: mental anguish; personal and public humiliation; damage to reputation, career, and employment opportunities; loss of income and all benefits derived from employment with the court system; fear, and resultant avoidance, of entering the Queens courthouses, particularly defendant's courtroom; fear that items may have been seized during the searches of his office and not returned to him; and fear that defendant will further retaliate against him for his instituting this action, exposing judicial misconduct, and otherwise exercising his First Amendment rights.

K. JURY TRIAL DEMAND

41. Plaintiff demands a jury trial on all issues in this action to the extent allowable by law.

L. PRAYER FOR RELIEF

WHEREFORE, plaintiff requests judgment against defendant, as follows:

1. A declaration that defendant discharged plaintiff and had him physically removed from the courthouse, not for the pretextual reasons defendant has proffered, but rather for his protesting, and considering to air, judicial misconduct.

2. An order permanently enjoining defendant, and all those acting in concert with him, from (a) stating that the reason for plaintiff's discharge or removal was anything other than his objecting to, and contemplating the exposure of, judicial misconduct; (b) interfering with the efforts of

plaintiff, or anyone who wishes to assist him, in exposing such misconduct or vindicating the rights of those prejudiced by it; and (c) otherwise retaliating against plaintiff for his having exercised, or his exercising, his First Amendment rights in relation to this action or the issues involved therein.

3. Monetary relief against defendant in the form of (a) compensatory damages in the amount of $500,000; (b) punitive damages in the amount of $500,000; and (c) attorney's fees, costs, disbursements, and interest.

4. For such other relief that this Court deems proper.

BRIAN SHEPPARD, Plaintiff

by _____
BRIAN SHEPPARD
Attorney for Plaintiff

511 S. 13th Street
New Hyde Park, N.Y. 11040
(516) 358-7599
BS 9909

Dated: April 16, 1991

EXCERPTS FROM RESPONDENT'S DEPOSITION TRANSCRIPT OF JULY 9, 1998

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
BRIAN SHEPPARD,
PLAINTIFF,
-against-
LEON BEERMAN, ETC.,
DEFENDANT.
----------X
DATE: July 9, 1998
TIME: 9:40 a.m.

CONTINUED EXAMINATION BEFORE TRIAL of the Defendant, LEON BEERMAN, taken by the Plaintiff, held at the offices of Dennis C. Vacco, Esq., State of New York, Office of the Attorney General, 120 Broadway, New York, New York 10271, before MICHELLE F. DiBIASE, a Notary Public of the State of New York.

* * * * *

RESPONDENT'S 7-9-98 DEPOSITION TRANSCRIPT

[Page 200]

* * * * *

Q. During my tenure as your law clerk, was one of my tasks to draft the jury charge whenever you had a jury trial?
A. To some extent.
Q. To what extent?

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A. Well, we had standard charges that were already established and they would then make the necessary changes applicable to the case on trial, and I would ask you to look it up and make suggestions.
Q. Did I write up a charge and give it to the typist to type up and then she gave it to you?
A. In some instances she gave it to me and whatever corrections I thought had to be made she would make it.
Q. How many other times was it done or on other occasions?
A. On all occasions.
Q. During my tenure as your law clerk, did you maintain files on each case that you presided over?
A. Yes, I did.
Q. After you read the charge to the jury, would the written charge be placed into your file for that case?
A. In most cases.
Q. What would happen to the charge in the cases where you didn't put it in the file?
A. I don't remember now. Probably

RESPONDENT'S 7-9-98 DEPOSITION TRANSCRIPT

[Page 202]

destroyed.
Q. On what basis would you put some charges into the file and not others?
A. I don't know now what cases I put the charges in and what cases I did not. It may have been a lack of attention that I may have given the case. It may have been the failing to file properly. There may have been a lot of reasons why it may not have been put in the file or why it was omitted.
In most instances, I'd say the file contained everything pertaining to that case, my notes, and the charges, and the results.
Q. But in some instances you didn't put the charge into the file?
A. I don't recall whether I did or I didn't. I just indicated they may not have been in there due to, perhaps, a lack of filing or any other reason that may have taken place at that time. I don't know.
Q. Was it your practice to put them into the file, the jury charges?
A. Generally.
Q. It was just your general practice?

[Page 203]

A. Generally.
Q. If I had said to you, "I'm going to throw this out now, this written charge," would you would have said "Fine"?
MR. SILLER: Objection.
A. I don't know what I would have said at that time. It's a hypothetical question and I can't answer that.

RESPONDENT'S 7-9-98 DEPOSITION TRANSCRIPT

Q. Did you retain all of these files in your chambers during my tenure with you?
A. Yes, I did. Yes.
Q. For a jury charge that was put into a file at the end of the case, would the jury charge remain in the file during my tenure with you?
A. I assume so.
MR. SILLER: Don't assume.
A. My only answer, because it may have been taken out, because there may have been a similar case I maybe tried, and I used those charges and, perhaps, those charges were not returned to the original file.
Q. When you were a sitting judge, did there come a time when any of these files were no longer in your chambers?

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A. Not that I can recall.
Q. While you were a sitting judge, did there come a time that any of the jury charges placed in the files were no longer in your chambers?
A. Not that I can recall.
Q. When did your service as an active judge end?
A. That's a good question. I believe it's 1992. I think it's the end of 1992.
Q. What happened to those files at that time?
A. I took them home and I destroyed them. They took up too much space.
Q. You took all of them home and then destroyed them?
A. Yes, unless I may have destroyed some of them before I transported it to my home, because

RESPONDENT'S 7-9-98 DEPOSITION TRANSCRIPT

of the lack of space, but I don't recall at the moment.

Q. Is there any reason why you didn't just destroy them at the office?

A. No particular reason.

Q. About how many files would you say were

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there at the time that you left?

A. I don't recall how many cases I tried or how many motions were made before me during my tenure as a sitting judge.

Q. These files were on every case, just not ones you tried?

A. That is correct -- let me qualify that. That's not correct. There was no file held on motions. There are only files on actual trials. The only things kept on motions were orders.

Q. Let me see if I understand this. If you had a criminal case and the Defendant took a guilty plea, there was no file kept on that case?

A. No. There may have been. There may have been a file, yes.

Q. You're not sure?

A. There was a notation. I'm fairly certain there was a notation of what transpired.

Q. Were those kept in your chambers during my tenure?

A. Yes, with all the other files.

Q. What sorts of cases wouldn't there be a file on?

A. Where there were motions that were

RESPONDENT'S 7-9-98 DEPOSITION TRANSCRIPT

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made, written motions that were made, and decisions rendered on exclusionary motions, suppression motions, things of that sort. The only thing I believe that was kept was the decision and the opinion.

Q. When you talk about exclusionary motions, they would have been made as part of a case that was before you?

A. Usually.

Q. So, there would be a file on the case?

A. I don't recall on which particular incident I may have had a file or I didn't have a file. I know definitely that I had files on cases that were tried before me.

Q. Do you know definitely that you had cases on file where a plea was taken before you?

A. Yes.

Q. How long after you took the files home did you destroy them?

A. Oh, shortly thereafter.

Q. At any time after your tenure as a sitting judge, did you make any efforts to ascertain what had happened to the files?

MR. SILLER: Objection. Which files?

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MR. SHEPPARD: The ones that he took home.

A. The ones that I destroyed?

Q. The ones that were in the courthouse.

MR. SILLER: Can you read the question back?

A. It's not very clear to me if I made any particular efforts.

RESPONDENT'S 7-9-98 DEPOSITION TRANSCRIPT

MR. SILLER: Let's read it back.
(Whereupon, the referred to question was read back by the Reporter.)
A. Clarify yourself on that.
MR. SHEPPARD: I will withdraw the question.
Could you mark this as Exhibit 8, I believe?
(Whereupon, the aforementioned four-page document was marked as Plaintiff's Exhibit 8 for identification as of this date by the Reporter.)
MR. SHEPPARD: May I have that.
Q. I show you Exhibit 8, which is a copy of Plaintiff's Request for Documents dated March 27, 1992. Have you ever seen this before?

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A. I did.
Q. When was that?
A. I guess, shortly after this request was made.
Q. I ask you to turn to page three and look at request number 10.
A. Yes.
Q. Have you ever read this request before?
A. I did.
Q. When was that?
A. After it was made.
MR. SHEPPARD: Could you please mark this as Plaintiff's 9?
(Whereupon, the aforementioned four-page document was marked as Plaintiff's Exhibit 9 for identification as of this date by the Reporter.)

RESPONDENT'S 7-9-98 DEPOSITION TRANSCRIPT

Q. I show you Exhibit Number 9, which is a copy of Defendant's Responses and Objections of April 27, 1992 to Plaintiff's Request for Documents.
Have you ever seen this before?
A. Yes, I did.
Q. When was that?

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A. Shortly after -- shortly before it was prepared --
Q. You saw the document --
A. -- and submitted.
Q. You saw the document before it was prepared?
A. Before it was submitted, I mean.
Q. I ask you to turn to page three and look at the two sentences constituting the objections to request number 10.
Have you ever read those two sentences before?
A. Yes, I did.
Q. When was that?
A. When this was prepared.
Q. You mean between the time it was prepared and when it was filed?
A. And submitted, yes.
MR. SHEPPARD: Could you please mark this as Plaintiff's 10?
(Whereupon, the aforementioned five-page document was marked as Plaintiff's Exhibit 10 for identification as of this date by the Reporter.)

RESPONDENT'S 7-9-98 DEPOSITION TRANSCRIPT

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Q. I show you Exhibit, Plaintiff's 10, which as a copy of Defendant's Response of December 23, 1996 to Plaintiff's Amended Document Request. Have you ever seen this before?

A. Yes.

Q. When was that?

A. Before it was submitted.

Q. I ask you to turn to page three and four and look at request number three and the response thereto.

A. You're referring to which request? Two and three?

Q. Number three. The request and the response on pages three through four, have you ever read the request before?

A. Yes.

Q. When was that?

A. When the request was made.

Q. Had you ever read the response before?

A. Yes, I did.

Q. When was that?

A. Before it was submitted.

Q. Okay, you can give me back all of those exhibits. Thank you.

* * * * *

EXCERPTS OF DEPOSITION TRANSCRIPT OF PROSECUTORIAL SUPERVISOR JACK WARSAWSKY

[Page 1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
BRIAN SHEPPARD,

PLAINTIFF,

CASE NO. CV 91-1349 (ILG) (RML)

-against-

LEON BEERMAN, ETC.,

DEFENDANTS.
----------X

DATE: April 5, 1999
TIME: 2:00 p.m.

EXAMINATION BEFORE TRIAL of a nonparty witness, JACK WARSAWSKY, taken by the Respective Parties, pursuant to a Subpoena, held at the offices of DIAMOND REPORTING, INC., 16 Court Street, Brooklyn, New York 11241, before a Notary Public of the State of New York.

* * * * *

WARSAWSKY DEPOSITION TRANSCRIPT

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* * * * *

Q. Are you currently employed?
A. Yes.
Q. Where?
A. Queens District Attorney's office.
Q. What is your title with the district attorney's office?
A. Deputy bureau chief of homicide trials.
Q. How long have you held that position?
A. September '97, I believe maybe even earlier, I think it's around that time.
Q. Generally, what does that position involve?
A. When the bureau chief is not available on vacation, I take over the supervisory role in supervision of the staff in my borough.
Q. What generally is the nature of the position when the bureau chief is available?
A. I handle a caseload of homicides as a

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colleague.
Q. How long have you worked for the Queens D.A.'s office?
A. Since February 1981.
Q. What other positions have you held in the office, if any?
A. I was a bureau chief in Supreme Court trials and I had another title, senior trial attorney and assistant district attorney.
Q. During what period of time were you bureau chief of the Supreme Court trials?

WARSAWSKY DEPOSITION TRANSCRIPT

A. That was 19 -- in September of 1990 to December 31, 1991.
Q. During what period were you a senior trial attorney?
A. Prior to my being bureau chief for a couple of years and then when the present D.A. became D.A., I was changed to a regular assistant attorney and then about -- I guess about 1994 or so, '95, I was made a senior trial attorney again until I became deputy bureau chief.

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Q. Have you ever seen a former law clerk speak to a prosecutor?
A. Former law clerk; law secretary?
Q. Yes.
A. Speak to a prosecutor?
Q. Yes.
A. I would have to say yes.
Q. By the way, for the rest of the deposition, I'll refer to law secretaries as law clerks.
A. Okay.

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Q. How often on the trial before Judge Cooperman on the vehicular homicide did you

WARSAWSKY DEPOSITION TRANSCRIPT

observe?
A. I'm pretty sure it was some time after jury selection. For some reason I don't recall being present for jury selection; otherwise, I was there to the bitter end.
Q. Do you remember watching the trial from the point when jury selection began to the end of the trial?
A. I don't have any recollection that I was present for jury selection. I believe I was told to supervise him closely at some time during this case in the commencement of the people's case, so it was sometime after. I believe it was sometime after opening. I could be wrong, but that's my recollection.
Q. As far as you remember, was it after the first witness was called?
A. I don't remember one way or the other.
Q. Were you watching any of the case before you were told to watch it closely?

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A. I have no recollection of doing that, but my practice back then would have resulted in, you know, my possibly catching in any event whether I was told to watch it closely or not.
Q. Was it your practice to watch the trials of everyone you supervised?
A. Walk in and you know, make myself available to people who were on trial, yes.
Q. What do you remember was the reason why you were asked to watch this trial closely?
A. I think word got back to my supervisor that Jackson should be supervised, that he needed supervision on this particular case.

WARSAWSKY DEPOSITION TRANSCRIPT

Q. Do you remember why he needed you on this particular case?
A. Well, my opinion, he needed it on all cases, but I don't remember if it was because it was his first homicide case or whether he was doing something inappropriate or because Judge Cooperman, he was very much a stickler. I don't know if it was a combination of those factors or something other than that.
Q. Other than Mr. Jackson, how would anyone in the D.A.'s office know whether Judge

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Cooperman was being a stickler and in such a way that Mr. Jackson needed special supervision?
A. Some other assistants may have said something, law secretary may have spoken to somebody, perhaps even the judge could have called somebody high in the office and said, you know, I think your assistant should have somebody, he needs somebody and that's not something that I would put beyond a possibility.
Q. Have you ever experienced that happening, where a judge contacted someone in your office and advised the person in your office that an A.D.A. needed some supervision?
A. Or assistance or something, yes.
Q. How often would you say that's happened?
A. How often, I don't think it happens frequently at all.
Q. Do you remember it ever happening with Judge Cooperman?
A. With Judge Cooperman specifically?
Q. Yes.

A. Other than that case and if he was a source of the call, I don't remember any of the

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incident.
Q. When a judge would call someone from your office, who would they call the immediate supervisor of the trial A.D.A.?
A. Sometimes the immediate supervisor, sometimes the executive assistant for trials, executive assistant or attorney for trials, the D.A. himself; it could be many different people.
Q. This would be called a trial was going on?
A. I don't think he'd leave the bench and make the call, but maybe at the end of the day or something. I mean I don't think it would be an impossibility.
Q. Would the Defendant be a party to this communication?
A. No.
Q. Do you see anything improper about a judge calling a supervisory personnel in the prosecutor's office and indicating that the judge thought that the prosecutor assigned to the case needed some assistance?
MR. SILLER: Objection.
MR. COLLEY: Join.

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A. No.

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WARSAWSKY DEPOSITION TRANSCRIPT

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Q. You mentioned earlier that sometimes judges in Queens will contact supervisors in the D.A.'s office about what's happening during a trial where the trial attorney needs assistance; what is your understanding of the reason why a judge would do that?

A. If a judge thinks that the assistant needs help or perhaps he should do something, whatever, I mean a judge has never contacted me, but I know one of my cases, a judge thought that it was appropriate that I should have a second seat on a two-defendant, two-jury trial and that resulted in me getting somebody to second seat me.

Q. Did the judge suggest it to you or did he contact a supervisor?

A. I don't remember if the judge spoke to me about that, but I know that a supervisor assigned me a second seat without my request.

Q. Aside from that case, how is it that you're aware that sometimes this goes on?

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A. Based on that and it's not something that, you know, would shock me.

Q. Have you ever actually heard it happening other than the one situation when you were on trial?

A. No, I don't recall other than that, you know, actual specific instances.

Q. Do you remember ever hearing anyone in the D.A.'s office ever talk about that situation

happening?
A. That a judge called up?
Q. A supervisor and said that an assistant needed some help?
A. I mean this doesn't come as a shock to me so I can't put my finger on it, you know, actual recollection of it actually happening, but I don't think it's something that shocks me, so I don't think it's something that hasn't happened before. I don't think it's something extraordinary.
Q. How often has it happened?
A. I've been in the office 18 years and if you called and said the defendant's attorney should be shot, that would shock me. When it happened to me, I wasn't shocked, it's not something that is

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shocking.
Q. Do you have any reason to believe that all judges in Queens engage in this sort of conduct of contacting the D.A.'s office when they think an assistant needs help?
A. All judges, no, I don't think all judges.
Q. Why do you say that?
A. Because there are some judges that wouldn't give the D.A.'s office the time of day if they were asked.
Q. Are those the judges that you would consider pro-defendant as opposed to pro-prosecution?
A. You know, you're going to get some of the judges down the middle. There are some of the judges that would not do that and some of the judges that I don't find hard to believe that they

WARSAWSKY DEPOSITION TRANSCRIPT

supposedly would do it.
Q. Other judges that you would not find it hard to believe they would, are those the ones that you would consider pro-prosecution?
MR. COLLEY: Objection.
MR. SILLER: Join.

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A. I can't say exclusively peoples' judges.
Q. Would you say predominantly?
A. I probably agree with that.
Q. You testified earlier that these calls from the judges are not with the participation of the Defendant's attorney. From what you know or aware of, does the defense attorney ever find out that the judge contacted the prosecutor for this purpose, the prosecutor's office?
A. I'm not aware of them finding out.
Q. Are you aware of any judges ever calling up the Legal Aid Society and suggesting to the supervisors there that a Legal Aid attorney made need some assistance?
A. That also would not shock me. Am I aware of any instances, no.
Q. Other than judges calling up the supervisors in the D.A.'s office to suggest that a prosecutor may need some assistance, are you aware of any other contacts between judges in Queens and the D.A.'s office that do not involve participation of Defendant's attorney?
A. No.

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WARSAWSKY DEPOSITION TRANSCRIPT

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Q. You testified that it would not surprise you if you heard that a judge called up the prosecutor's office to suggest that the assistant needed help; are you aware of Judge Beerman ever having done this?

A. No.

Q. I believe you also testified that in your view, it would not be improper for a judge to do that, what do you --

A. They're not discussing the particulars of the case and I don't think it's improper any more than a D.A. speaking to a law secretary of the facts of the case.

Q. In your view, if a judge is concerned about the ability of one side or the other to represent their respective clients, is that a situation that is designed to aid one side or the other or to improve the overall administration of justice?

MR. SHEPPARD: Objection.

A. It could be either one or both.

MR. SILLER: I don't have anything further. Thank you.

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EXAMINATION BY
MR. SHEPPARD:

Q. Do I understand your testimony to be that generally Judge Brown is biased in his favor of the defense?

A. Kenneth Brown?

Q. Yes.
A. I would not hesitate in stating that.
Q. Is that in all cases across the board or in specific types of cases?
A. I have to say it's across the board.
Q. I think you testified that one can tell something about Judge Brown from his record on appeal, what do you mean by that?
A. Judge Brown had the ability to tell you on the record, without any hesitation, that I don't care what the law is, when you cite him on the position, I don't care what the law is, appeal me, I'm the law in this courtroom and time and time again there have been cases when he's been reversed and the Appellate Division has cited previous reversals for the same reason and it's a scandal, I think that he's not been in any way disciplined for his refusal to follow the law.

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Q. Are these reversals on appeals of Judge Brown reversed in defendants' appeals or people's appeals?
A. Both, I mean if you were lucky enough to get a conviction after a jury trial in spite of his efforts to torpedo your case, invariably, the matter would be reversed for something he had done, his charge or something along those lines.
Q. If Judge Brown was being frequently reversed on defendants' appeals, how is he being pro-defendant if he was violating the defendant of a fair trial?
MR. SILLER: Objection.
MR. COLLEY: Join.

WARSAWSKY DEPOSITION TRANSCRIPT

A. A few times, like I said before, you start off at the premise of him being pro-defense, if for some reason, you as a defendant or defendant's attorney upset him, whatever the case.
Q. Do you have any idea why no one from your office has ever made a complaint?
A. I think no one wants to get -- as an office, nobody wants to get into a situation where you upset the judge.
Q. Why is that?

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A. Because you have to practice in front of the judge all the time and if the Appellate Division on their own seeing transcript after transcript, trial record after trial record on their own do not submit or refer the matter over to the disciplinary committee, then there's no hope for an attorney from the office doing anything, it's my personal opinion.
Q. Why do you say that?
A. Why do I say that?
Q. Yes.
A. Because you would think that the Appellate Division, seeing all these improper occurrences would on their own refer the matter over to the disciplinary committee. For the same reason we don't, they don't, because they want to protect their own.
Q. Isn't the commission of conduct separate from the Appellate Division?
A. Right.
Q. If someone other than the Appellate Division made a referral shouldn't the judicial commission look independently at the merits of the

claim on Judge Brown?

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MR. COLLEY: Objection.
MR. SILLER: Objection.
A. They should, but I don't know how much the commission on judicial conduct is held in high regard given some of the things that I have seen during my 18 years and many of us as assistants have seen in the years.
Q. Can you give us any examples?
A. Specific examples, no, outside a judge telling me I don't care what the law is, I'm the law in this part and whether it's Judge Brown or another judge saying it, I can't accept that as being something a judge should say.

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Q. You mentioned that you've spoken to law secretaries about the facts of the case, do you see anything improper about that?
MR. SILLER: Objection.
MR. COLLEY: Join.
A. No.
Q. Would you see anything improper if you spoke to the judge about the facts of the case instead of the secretary?
MR. SILLER: Objection.
A. Ex parte?
Q. Yes.
A. I would say yes.

Q. What if you asked any law secretary about it ex parte?
A. Yes, I think that's why the law

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secretary is there.
Q. What do you mean by that?
A. In many respect, they're buffers between you and the judge.
Q. A buffer?
A. I mean you may want to know should I bring this witness in or should I not and you may speak to the law secretary and get some kind of guidance and the law secretary may say you should or you shouldn't.
Q. When a law secretary does that, is he basing it on what he's finding out from the judge?
MR. SILLER: Objection.
A. I don't know. I don't find it inappropriate. I don't think it's inappropriate under the rules, disciplinary rules, for fact conversations about a case to take place between even a defense attorney or law secretary.
Q. Do you see anything wrong if a D.A. speaks to a law secretary about the facts of the case in the hope that the law secretary will transmit those facts to the judge?
MR. SILLER: Objection.
MR. COLLEY: Join.

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A. Do I see anything improper with that?
Q. Yes.

A. Just speaking to him with the hope that that person conveys it to the judge, I don't think literally there's anything improper with that, you know, whether it's in a gray area, I mean that maybe something else, but I don't think it's improper, no.

Q. In your view, why would it be proper to use the law secretary as a conduit to give information to a judge when it wouldn't be proper to do that directly with the judge?

MR. SILLER: Objection.

A. Because it's the law secretary's decision if the law secretary decides to do something. I have no control over that, that's up to the law secretary. I can't be bound by what somebody does with the information I report to them.

Q. Under the hypothetical, if you desired to have the law secretary do that, do you see anything wrong with that?

MR. SILLER: Objection.

MR. COLLEY: Objection.

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A. No.

Q. Under the hypothetical, aside from your desire based on your past experience with a law secretary, you strongly believe a law secretary will pass it along to the judge, do you see anything wrong with doing that?

MR. SILLER: Objection.

MR. COLLEY: Objection.

A. No.

MR. SHEPPARD: No other questions.

Thank you.

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EXCERPTS OF DEPOSITION TRANSCRIPT OF PROSECUTORIAL SUPERVISOR KENNETH APPELBAUM

[Page 1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
BRIAN SHEPPARD,

PLAINTIFF,

-against- CASE # CV1349-91 (ILG) (RML)

LEON BEERMAN, ETC.,

DEFENDANTS.
----------X

DATE: January 5, 1999
TIME: 10:20 a.m.

EXAMINATION BEFORE TRIAL of a Non-Party Witness, KENNETH APPELBAUM, taken by the Plaintiff, pursuant to a Subpoena, held at the offices of the NEW YORK CITY LAW DEPARTMENT, 100 Church Street, New York, New York 10007, before a Notary Public of the State of New York.

* * * * *

APPELBAUM DEPOSITION TRANSCRIPT

[Page 8]

* * * * *

Q. Are you currently employed?
A. Yes, I am.
Q. Where are you employed?

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A. Queens County District Attorney's Office.
Q. What is your title?
A. Deputy bureau chief.
Q. What bureau is that?
A. Special victims bureau.
Q. How long have you held that position?
A. Approximately two or three years.
Q. When did you begin working for the D.A.'s office in Queens?
A. August 12, 1995-- 1985. I am sorry.
Q. Did you ever work in the appeals bureau of that office?
A. Yes, I did.
Q. When was that?
A. It was, I believe, January of 1986.
Q. When did that end?
A. Sometime in 1988.
Q. While you were in the appeals bureau, was there ever a time when members of that bureau were also assigned as trial level prosecutors in the courtroom of Judge Beerman?
A. Yes.

* * * * *

APPELBAUM DEPOSITION TRANSCRIPT

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Q. Did you ever tell Judge Beerman that you believed that his pro-defendant rulings were one of the reasons for acquittals in his part?
MR. SILLER: Objection.

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A. I don't recall saying that.
Q. Would it have been improper for you to have told him that?
MR. SILLER: Objection.
A. If we were discussing matters generally, I don't believe so. If we were discussing a specific case, then it might be improper.
Q. Would it have been improper for you to have told him that if you told him this without a defense attorney present?
MR. SILLER: Objection.
A. If we were discussing matters generally, I don't think so. Is your question that if I told the judge that I thought he was too pro-defense outside the presence of any defense attorney?
Q. Yes.
A. I don't believe that would be improper.
Q. Have you ever discussed that issue with anyone else in your office as to whether such a communication would be improper?
MR. SILLER: Objection.
MR. COLLEY: Objection.

APPELBAUM DEPOSITION TRANSCRIPT

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A. No.
Q. Do you know whether other ADAs engaged in such conduct with judges?
MR. SILLER: Objection.
MR. COLLEY: Objection.
MR. SILLER: We are getting beyond the scope with respect to the Order of Judge Levy dated March 31, 1998. Please limit yourself the parameters of that Order.
Q. Well, do you personally remember ever having such a conversation with any judge?
MR. SILLER: Objection. Same objection.
MR. COLLEY: Objection.
MR. SHEPPARD: Mark that for a ruling.
MR. SILLER: The Order states that you can take Discovery from ADAs who have personal knowledge of alleged instances of corruption and then-- I am reading from Page 16 of the aforementioned March 31st Order, Paragraph 2. Plaintiff may also take Discovery from assistant district attorneys or administrative court personnel who are likely to have personal knowledge, and that's italicized, of alleged instances of corruption in any other

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individual case about which plaintiff has specific knowledge in December 1990, that's italicized, about which plaintiff had specifically knowledge in December 1990. If you're asking him about other cases which you clearly don't know about, then

you're going to be beyond the Order. I don't think there's any reason to mark it for a ruling.

MR. SHEPPARD: We may be able to deal with this the same way.

MR. SILLER: I want to make this clear so we don't go down a road because it is improper.

MR. SHEPPARD: I was planning on stopping it right now, gentlemen.

MR. SILLER: If you're intending to ask similar questions, I want to make it clear that I think it is improper.

MR. COLLEY: I'd like to join in that objection. I ask Madam Court Reporter to please certify the question and we can call later on. I'd like to proceed right now.

MR. SHEPPARD: We may also-- I would

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have to look at it, take care of stipulations that Mr. Siller and I have been using that we just agree that I have to just think about it for a minute. We agree that Mr. Siller's interpretation is the proper interpretation of the Order and leave it at that instead of having to bother the magistrate judge unnecessarily and appealing to Judge Glasser to observe it.

MR. COLLEY: That's fine.

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APPELBAUM DEPOSITION TRANSCRIPT

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* * * * *

Q. Did you ever have a conversation with Judge Beerman concerning his rulings being pro-defendant?

MR. SILLER: Objection.

A. I don't specifically recall that.

Q. Do you have any vague recollection of it?

A. No, I remember having a conversation with him where I expressed my opinion that he tended to compromise on his rulings a lot rather than address each one on its merits. Just as a general matter, we had that conversation at one time.

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Q. Do you remember where that conversation was?

A. It might have been the courtroom.

Q. Might it have been in chambers?

A. I don't recall.

Q. Who else was present during that conversation?

A. I don't recall.

Q. Do you remember whether any defense attorney was present?

A. I don't recall.

Q. Do you remember whether you were talking about a specific case or just in general?

A. In general.

Q. Do you remember how the conversation came up?

APPELBAUM DEPOSITION TRANSCRIPT

A. No.
Q. Do you remember Judge Beerman's response, if any, to what you said?
A. I don't recall.
Q. Do you ever remember being in Judge Beerman's chambers without a defense attorney present?
A. Not specifically.

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Q. Well, do you have a vague recollection of it?
MR. SILLER: Objection.
A. It could happen, but I don't recall.

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Q. Have you ever believed that any acquittal by juries before Judge Beerman were attributable in any way to rulings he made?
MR. COLLEY: Objection.
MR. SILLER: Objection.
A. I can't think of a specific instance. I think the outcome of trials are often related to rulings, evidentiary rulings made during the trial.
Q. Do you remember believing that that happened in a case that Judge Beerman tried?
A. That a jury, the outcome a case was related to his evidentiary rulings?
Q. That an acquittal was related to his evidentiary rulings?
A. I can't think of a specific instance.

Q. Do you remember ever having a belief in general that some of Judge Beerman's rulings were partly a cause for some of the acquittals in his part?

MR. SILLER: Objection.

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MR. COLLEY: Objection.

A. I don't specifically remember thinking that about Judge Beerman, but I think that about judges all the time.

Q. Do you remember anyone ever discussing that topic as it relates to Judge Beerman?

A. Not specifically.

Q. Do you have a general recollection?

A. I recall generally. There would be grumbling about certain rulings.

Q. Belonging to the appeals bureau attorneys?

A. Right.

Q. But, do you remember any of this grumbling being about the relation between his rulings and acquittals?

MR. COLLEY: Objection.

MR. SILLER: Join.

A. I don't specifically recall. Are you talking about in a specific case or general?

Q. Generally.

A. I mean that very well could have been discussed. I don't recall specifically.

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Q. Did you ever tell me that you thought that Judge Beerman seemed too concerned with being reversed?

MR. COLLEY: Objection.

MR. SILLER: I'll join.

A. I don't have a recollection of that.

Q. Would it have been improper for you to tell me that?

MR. COLLEY: Objection.

MR. SILLER: Objection.

A. I don't believe so.

Q. What if you told me that ex parte?

MR. COLLEY: Objection.

MR. SILLER: Objection.

A. You're not a judge and I believe I can have conversations with you informally.

Q. So it is your answer that if you had told me that ex parte that it would have been

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improper?

MR. COLLEY: Objection.

MR. SILLER: Objection.

A. My answer is that hypothetically if I told you I was displeased with the way Judge Beerman ruled on certain issues, would that be improper, no, I don't believe that would be improper.

Q. My question is not about your disagreeing with his decisions. Would have it have been improper for you to tell me ex parte that

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Judge Beerman seemed too concerned with being reversed?
MR. COLLEY: Objection.
MR. SILLER: Objection. Asked and answered.
A. You-- as I said, I don't recall telling you that. I don't believe had I told you that, that it would have been improper.
Q. Did you ever believe that Judge Beerman seemed too concerned with being reversed?
MR. COLLEY: Objection.
A. I don't recall any specific instances, but I certainly may have felt that at the time

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after certain rulings were made.
Q. Do you remember ever discussing it with anyone?
A. Not specifically.
Q. Do you remember whether anyone else in the appeals bureau shared your view?
A. They might have.
Q. Do you remember that being a topic of conversation among the appeals bureau people that Judge Beerman seemed to concerned about being reversed?
MR. COLLEY: Objection.
A. I don't specifically recall a conversation where that was being discussed, but it very well could have been discussed.
Q. Did you ever tell me that only five percent of criminal convictions in Queens that are reversed on appeal?
A. I don't recall telling you that.
Q. Did you ever discuss with anyone the

APPELBAUM DEPOSITION TRANSCRIPT

percentage of criminals convicted in Queens are reversed on appeal?
A. I don't recall.
Q. Did you ever tell me that Judge

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Beerman's rulings should be influenced by the fact that criminal convictions in Queens are infrequently reversed?
A. I don't remember telling you that.
Q. Would it have been proper for you to tell me that?
MR. COLLEY: Objection.
MR. SILLER: Objection.
A. Would-- is your question would it be improper for me to tell you to tell Judge Beerman something to influence his decision making?
Q. No. The question is would it have been proper for you to tell me that Judge Beerman should be influenced by the fact that criminal convictions in Queens are frequently reversed?
A. I don't know.
Q. What if you told me that ex parte?
MR. COLLEY: Objection.
MR. SILLER: Objection.
A. I don't think that bears on the issue.
Q. Did you ever tell me that your behavior as a trial prosecutor was influenced by the fact that criminal convictions in Queens are infrequently reversed?

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A. I don't recall saying that.

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MR. COLLEY: Objection.
MR. SILLER: Objection.
Q. Has your behavior as a trial prosecutor ever been so influenced by the rate of reversal of convictions?
MR. COLLEY: Objection.
MR. SILLER: Objection.
A. I don't believe so.
Q. Would it be proper for your behavior to be so influenced?
MR. COLLEY: Objection.
MR. SILLER: You're asking about his actions?
MR. SHEPPARD: Right.
MR. SILLER: Is this what you consider to be corruption discovery?
MR. SHEPPARD: This is just simply a specific passage in the notes of courthouse corruption. This was a conversation that's in there at the same time that he had the conversation with Judge Beerman.
MR. SILLER: Are you going to-- I mean are you going to try to link this somehow to

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alleged corruption of Judge Beerman? If you're not, I think you're beyond the--
MR. SHEPPARD: Let me see. Hold on. Do we have a pending question?
(Whereupon, the referred to portion of the record was read back by the Reporter.)
MR. SHEPPARD: We may be able to deal with you-- mark it for a ruling.

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EXCERPTS OF DEPOSITION TRANSCRIPT OF PROSECUTORIAL SUPERVISOR HERBERT LEIFER

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
BRIAN SHEPPARD,

PLAINTIFF,

-against- CASE # CV1349-91 (ILG) (RML)
LEON BEERMAN, ETC.,
DEFENDANTS.
----------X

DATE: January 5, 1999
TIME: 11:35 a.m.

EXAMINATION BEFORE TRIAL of the Non-Party Witness, HERBERT J. LEIFER, taken by the Plaintiff, pursuant to a Subpoena, held at the offices of the NEW YORK CITY LAW DEPARTMENT, 100 Church Street, New York, New York 10007, before a Notary Public of the State of New York.

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LEIFER DEPOSITION TRANSCRIPT

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Q. Are you currently employed?
A. Yes.
Q. Where?
A. Queens County District Attorney's office.
Q. What is your official title?
A. I am the coordinator of alternative sentencing programs.
Q. How long have you held that position?
A. That specific position, probably six years.
Q. How long have you worked in the Queens DA's office?
A. It was twenty-five years on October 12, 1998.
Q. What position did you hold in general of 1989?
A. I believe, at that time, I was chief of the major offense bureau.
Q. Do you remember when you started that position?
A. I held that position for about seven years. So I probably started somewhere around '84, '85, something like that.

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Q. And around when did that end?
A. It ended when, shortly before the district attorney Richard Brown took office. So, and he's been in office now, I believe, almost seven years. So that would have been 1991, approximately 1990, 1991.
Q. Do you remember specifically what your

LEIFER DEPOSITION TRANSCRIPT

position was in November of 1990?
A. I was probably the chief of major offense bureau because I held the job until about '91 or so.
Q. What were your duties at that position?
A. I supervised a number of assistant district attorneys and we handled cases involving the most serious offenders, to the exclusion of homicides.

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Q. During that period, did your duties include being available if a judge wanted to phone you to discuss a pending matter?
A. The only time I ever discussed pending matters was with other attorneys. Or if there was a case conference and I was called by a judge to conference the case with the judge and the defense attorney, then I would do it. But generally, I did not participate in that because those cases were assigned by me to specific ADAs.
Q. So you don't remember being called by a judge when there was no defense attorney on the line?
MR. COLLEY: Objection. You may answer.

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A. You're talking about on the telephone?
Q. Yes.

LEIFER DEPOSITION TRANSCRIPT

A. I never conferenced a case by the telephone. I thought you meant called in the chambers.
Q. No.
A. No, never on the phone. Never on the telephone.
Q. Did your duties included dropping tin the chambers of judges to chat about general matters?
MR. COLLEY: Objection.
MR. SILLER: Join.
THE WITNESS: Answer?
MR. COLLEY: Yes.
A. My procedure when I was head of the major offense bureau was to visit every judge every day to find out if there were any problems relative to cases pending in their parts or whether the ADAs were appearing on time, whether the witnesses were produced expeditiously, whether there was a lot of down time because of availability of ADAs or witnesses. I would start at 9:00 in the morning and I would visit every judge every day; and there

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were approximately ten judges that I would visit each day. Occasionally, the judge was not on the bench when I would arrive and I might go in the back and say good morning, how's everything going, any problems on the trial, is the ADA doing what he is supposed to do, is he appearing on time, is the witness being prepared on time. Is there anything I can do to assist in expediting the trial. That was it.
Q. When you would have these conversations, would there be a defense attorney

LEIFER DEPOSITION TRANSCRIPT

present?
A. Sometimes yes, sometimes no, depending on the time of the day. If it was 9:00 in the morning and there was no one around, I would just be allowed into chambers, I would say how's everything going.
Q. You would discuss just administrative matters?
A. Yes, you know, case management, not specific cases. Because again, as I said, I did not handle cases. Every file would come to me out of arraignment. I would review the file. I would determine which ADA I believed was most qualified

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to handle that case. I would then write his name on the folder and give it to him.
Q. And the judges who you would call on each day, those were the ones you were assigned major offenses?
A. Major offenses, right.

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